Indonesia – Importation of Horticultural Products, Animals, and Animal Products
(DS477 / DS478)

Second Written Submission of
the United States of America

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TABLE OF ACRONYMS

Acronym	Full Name
API-P	Producer Importer Identification Number
API-U	Registered Importer Identification Number
ASEIBSSINDO	Association of Exporter-Importers of Fresh Fruit and Vegetables in Indonesia
BULOG	Indonesian Bureau of Logistics
DGLAHS	Directorate General of Livestock and Animal Health Services
DSU	Dispute Settlement Understanding
GATT 1994	General Agreement on Tariffs and Trade 1994
HS Code	Harmonized System Code
MOA	Indonesian Ministry of Agriculture
MOT	Indonesian Ministry of Trade
PI	Producer Importer
RI	Registered Importer
RIPH	Horticultural Product Import Recommendation
UPP	Trade Services Unit of the Ministry of Trade
WTO	World Trade Organization

TABLE OF REPORTS

Short title	Full Citation
Argentina – Hides and Leather	Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather*, WT/DS155/R and Corr.1, adopted 16 February 2001
Argentina – Import Measures (AB)	Appellate Body Reports, *Argentina – Measures Affecting the Importation of Goods*, WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R, adopted 26 January 2015
Argentina – Import Measures (Panel)	Panel Reports, *Argentina – Measures Affecting the Importation of Goods*, WT/DS438/R and Add.1 / WT/DS444/R and Add.1 / WT/DS445/R and Add.1, adopted 26 January 2015, as modified (WT/DS438/R) and upheld (WT/DS444/R / WT/DS445/R) by Appellate Body Reports WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R
Brazil – Retreaded Tyres (AB)	Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R, adopted 17 December 2007
Chile – Price Band System (AB)	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R, adopted 23 October 2002
Chile – Price Band System (Panel)	Panel Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/R, adopted 23 October 2002, as modified by Appellate Body Report WT/DS207AB/R
Chile – Price Band System (Article 21.5 – Argentina) (AB)	Appellate Body Report, *Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Recourse to Article 21.5 of the DSU by Argentina*, WT/DS207/AB/RW, adopted 22 May 2007
China – Publications and Audiovisual Products (AB)	Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/AB/R, adopted 19 January 2010
China – Raw Materials (AB)	Appellate Body Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012

China – Raw Materials (Panel)	Panel Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/R, Add.1 and Corr.1 / WT/DS395/R, Add.1 and Corr.1 / WT/DS398/R, Add.1 and Corr.1, adopted 22 February 2012, as modified by Appellate Body Reports WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R
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Colombia - Textiles	Panel Report, *Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear*, WT/DS461/R, report under appeal
EC – Asbestos (Panel)	Panel Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R and Add.1, adopted 5 April 2001, as modified by Appellate Body Report WT/DS135/AB/R
EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US) (AB)	Appellate Body Reports, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador*, WT/DS27/AB/RW2/ECU, adopted 11 December 2008, and Corr. 1 / *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States*, WT/DS27/AB/RW/USA and Corr. 1, adopted 22 December 2008
EC – Seal Products (AB)	Appellate Body Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R / WT/DS401/AB/R, adopted 18 June 2014
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Korea – Various Measures on Beef (Panel)	Panel Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/R, WT/DS169/R, adopted 10 January 2001, as modified by Appellate Body Report WT/DS161/AB/R, WT/DS169/AB/R
Mexico – Taxes on Soft Drinks (AB)	Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R, adopted 24 March 2006
Peru – Agricultural Products (AB)	Appellate Body Report, *Peru – Additional Duty on Imports of Certain Agricultural Products*, WT/DS457/AB/R and Add.1, adopted 31 July 2015
Thailand – Cigarettes (Philippines) (AB)	Appellate Body Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/AB/R, adopted 15 July 2011
Turkey – Rice	Panel Report, *Turkey – Measures Affecting the Importation of Rice*, WT/DS334/R, adopted 22 October 2007
US – Clove Cigarettes (AB)	Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, adopted 24 April 2012
US – Gambling (AB)	Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, adopted 20 April 2005
US – Gasoline (AB)	Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996

TABLE OF U.S. EXHIBITS

Exh. No.	Description
US-87	"Total Imports into Indonesia of All Listed Fresh Horticultural Products" (data drawn from Global Trade Atlas (accessed Feb. 11, 2016); Statistics Indonesia, http://bps.go.id/all_newtemplate.php (accessed Feb. 16, 2016))
US-88	"Total Imports into Indonesia of Listed Processed Horticultural Products" (data drawn from Global Trade Atlas (accessed Feb. 11, 2016); Statistics Indonesia, http://bps.go.id/all_newtemplate.php (accessed Feb. 16, 2016))
US-89	"Total Imports into Indonesia of Certain Animal Products" (data drawn from Global Trade Atlas (accessed Feb. 11, 2016); Statistics Indonesia, http://bps.go.id/all_newtemplate.php (accessed Feb. 16, 2016))
US-90	"Indonesia Bans Import of 11 Horticultural Products," *Freshplaza.com*, Jan. 25, 2013, http://www.freshplaza.com/article/105352/Indonesia-bans-import-of-11-horticultural-products
US-91	Ali Abdi, U.S. Dep't of Agriculture, "Horticultural Products Permitted for Import by MOA," Feb. 16, 2016 (Exh. US-91)
US-92	John Hey, "Concern over Indonesian Citrus Imports," *AsiaFruit*, Nov. 18, 2015, http://www.fruitnet.com/asiafruit/article/167132/concern-over-indonesian-citrus-import-rules
US-93	Natalie Kotsios, "Department of Agriculture Confirms Indonesia Has Shut Its Borders to Australian Citrus," July 15, 2015, http://www.weeklytimesnow.com.au/agribusiness/horticulture/department-of-agriculture-confirms-indonesia-has-shut-its-borders-to-australian-citrus/news-story/e32282b4e9ad2dc30f20e0ae7637aee0
US-94	World Economic Forum, *Enabling Trade: Valuing Grown Opportunities* (2013)
US-95	"Indonesian Imports of Chilies and Shallots, 2009-2015" (data drawn from Global Trade Atlas (accessed Feb. 11, 2016); Statistics Indonesia, http://bps.go.id/all_newtemplate.php (accessed Feb. 16, 2016))
US-96	Ministry of Agriculture, "Summary of Fresh Product RIPHs Applied for and Issued, 2013-2014," http://eksim.pertanian.go.id/tinymcpuk/gambar/file/data_rekomendasi_eksim.pdf (accessed Feb. 29, 2016)
US-97	Ministry of Agriculture, "Horticultural Product Import Recommendation (RIPH)," Apr. 2013, http://eksim.pertanian.go.id/tinymcpuk/gambar/file/RIPH_APRIL_2013.pdf (accessed Feb. 29, 2016)

US-98	Ministry of Agriculture, "Horticultural Product Import Recommendation (RIPH) Developments," Feb. 2013, http://eksim.pertanian.go.id/tinymcpuk/gambar/file/RIPH_FEB_2013.pdf (accessed Feb. 29, 2016)
US-99	Ahmad Dimyati & Sri Kuntarsih, FAO, *Fruit and Vegetable Development Program for Human Health in Indonesia* (2006)
US-100	"Import Restrictions Eased as Prices Soar," *FoodTechIndonesia.com*, July 7, 2013, http://www.thejakartapost.com/news/2013/07/11/import-restrictions-eased-prices-soar.html
US-101	Zakir Hussain, "Indonesian Gov't Feels the Heat ad Food Prices Soar," *Straits Times*, July 24, 2013, http://news.asiaone.com/news/asia/indonesian-govt-feels-heat-food-prices-soar?nopaging=1#sthash.DVeawAmu.dpuf
US-102	Satria Sambijantoro, "Jokowi Gives Chili, Shallot Imports the Green Light," *Jakarta Post*, June 4, 2015, http://www.thejakartapost.com/news/2015/06/04/jokowi-gives-chili-shallot-imports-green-light.html#sthash.3cpRldNf.dpuf
US-103	"Trade Minister to Allow Chili Imports in June," *Tempo.co*, June 8, 2015, http://en.tempo.co/read/news/2015/06/08/056673108/Trade-Minister-to-Allow-Chili-Imports-in-June
US-104	Government Regulation No. 69/1999 on Food Labels and Advertisements, July 21, 1999
US-105	Decree of the Minister of Religious Affairs No. 518/2001 on the Guidelines and Procedures for Auditing and Stipulating Halal Food, Nov. 30, 2001

I. INTRODUCTION

1. In this dispute, the United States has challenged fifteen distinct prohibitions and restrictions imposed through Indonesia's licensing regimes for the importation of horticultural products and animals and animal products, as well as the regimes as a whole and a related restriction imposed through the framework legislation for the licensing regimes. The evidence and arguments advanced by the United States and our co-complainant New Zealand in the written and oral submissions in this dispute demonstrate that Indonesia's measures impose restrictions on importation and, indeed, have greatly restricted imports of the covered products into Indonesia over the past several years.

2. Specifically, Indonesia's import licensing regimes for horticultural products and animals and animal products impose the following restrictions on importation, among others:

- Strict application windows and validity periods for import permits mean that imports are *effectively stopped* for several months out of every year;

- Importers are required to predict in advance precisely the type, quantity, and country of origin of all products they will want to import in the following three- or six-month period and are *prohibited* from importing any other products or from applying for new or different permits once the period begins;

- Imports of certain horticultural products are *restricted* or *banned* altogether based on the domestic Indonesian harvest period for those products;

- Imports of horticultural products for an entire semester are limited to the quantity of storage *owned* by Indonesian importers;

- Imported animal products are blocked from access to the retail outlets where Indonesians make a *majority* of their meat purchases;

- Imports of certain products are *banned* when their market price falls below a government-determined level; and

- Importation is allowed only on the *condition*, and to the extent that, the Indonesian government determines that domestic supply is insufficient for domestic demand.

3. These prohibitions and restrictions are manifestly inconsistent with Indonesia's WTO obligations. Specifically, the U.S. written and oral submissions in this dispute demonstrate that each of these measures, as well as Indonesia's import licensing regimes taken as a whole, is inconsistent with key WTO obligations as set out in Article XI:1 of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") and Article 4.2 of the *Agreement on Agriculture*.

4. With one exception, Indonesia does not contest that any of these measures exist or operate in the way the co-complainants describe.[1] Instead, Indonesia advances flawed legal arguments in an attempt to show that the measures are, nevertheless, not inconsistent with the covered agreements. For example, Indonesia argues that: (1) Articles XI:1 and 4.2 require complainants to demonstrate that the challenged measures result in a quantifiable decrease in actual trade; (2) measures that operate by compelling private actors to make certain choices are excluded from the scope of Articles XI:1 and 4.2; and, (3) "automatic" import licensing regimes are *per se* excluded from the scope of Article 4.2. All of these legal interpretations lack any basis in the text of the relevant provisions and have been rejected by previous panels and the Appellate Body. Thus Indonesia has failed to rebut the *prima facie* case established by the co-complainants.

5. Further, Indonesia has failed to show that any of these measures is justified under Article XX of the GATT 1994. In particular, Indonesia has presented no evidence – from the text, structure, or operation of the challenged measures or from any other sources – that any of the challenged measures is established or maintained in pursuit of one of the legitimate regulatory objectives covered by Article XX. This is unsurprising, since the purpose of Indonesia's import licensing regimes is clear from their text, structure, and context. Indonesia's import licensing regimes were established with the explicit purpose of "control[ling] the import and export" of products, giving "priority to the selling of local . . . products,"[2] and allowing importation only "if local production . . . is not sufficient to fulfill [Indonesian] consumption needs."[3] Indonesian officials have repeatedly affirmed that the purpose of Indonesia's import policy is to "gradually reduc[e]" and ultimately halt altogether imports of agricultural products.[4] Thus, Indonesia cannot succeed in establishing that any of the measures is justified under Article XX of the GATT 1994.

6. In this submission, the United States will address each of these issues in turn. In Section II, the United States will explain why Indonesia has failed to rebut the co-complainants' *prima facie* case that each of the challenged measures is inconsistent with Article XI:1 of the GATT 1994. Section III explains that, for many of the same reasons, Indonesia similarly has failed to rebut the co-complainants' *prima facie* case under Article 4.2 of the Agriculture Agreement. Finally, Section IV explains that Indonesia has failed to establish that any of the challenged measures is justified under subparagraphs (a), (b), or (d) of Article XX of the GATT 1994.

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[1] *E.g.*, Indonesia's Response to Panel Question No. 10, para. 4.

[2] Law Number 13 of 2010 Concerning Horticulture, arts. 90, 92 (JE-1) ("Horticulture Law").

[3] Law Number 18 of 2009 on Animal Husbandry and Animal Health, art. 36(4) (JE-4) ("Animal Law").

[4] *See* Ministry of Industry, "Minister of Agriculture: Agricultural Imports Will Be Tightened," (Exh. US-10); "Meat Imports Tightened," *AgroFarm*, Mar. 12, 2012 (Exh. US-11).

II. INDONESIA'S IMPORT LICENSING REGIMES ARE INCONSISTENT WITH INDONESIA'S OBLIGATIONS UNDER ARTICLE XI:1 OF THE GATT 1994

7. The United States demonstrated in its written and oral submissions in this dispute that the prohibitions and restrictions on importation that Indonesia imposes through its import licensing regimes, as well as the regimes themselves, are inconsistent with Indonesia's obligations under Article XI:1 of the GATT 1994. Indonesia has failed to rebut the *prima facie* case established by the co-complainants. With only one exception, Indonesia has not contested that the challenged measures operate as the co-complainants described in their first written submissions.[5] Instead, Indonesia relies on erroneous interpretations of Article XI:1 that previous panels and the Appellate Body have rejected.

8. This Section explains that the two main legal arguments by which Indonesia attempts to rebut the co-complainants' case – that the co-complainants have not sufficiently quantified the trade-restrictive effects of the measures and have not shown that they are "maintained" by Indonesia – are based on incorrect legal premises and are factually inaccurate. This section then explains why Indonesia's other argument under Article XI:1, concerning the positive list for animals and animal products that can be imported, lacks merit.

A. Indonesia's Argument That Co-Complainants Have Not Established a *Prima Facie* Case under Article XI:1 Because They Have Not Proven Actual Trade Effects Is Legally and Factually Incorrect

9. With respect to most of the claims in this dispute, Indonesia asserts that the co-complainants have not established a *prima facie* case because they have not proven "that import volumes have decreased as a result" of the measure at issue.[6] Indonesia's argument is based on an incorrect legal premise. Article XI:1 does not require a showing that a measure has caused a decrease in import volumes or, indeed, any quantification of a measure's restrictive effect on importation. The evidence submitted by the co-complainants concerning the text, structure, and operation of each of the challenged measures is sufficient to establish a *prima facie* case with respect to each measure. Further, although not required, the co-complainants have presented (and continue to present in response to Indonesia's assertions) evidence demonstrating that the challenged measures have decreased Indonesian imports of the covered products.

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[5] *See, e.g.*, Indonesia's Opening Statement, paras. 14-17; Indonesia's Response to Panel Question No. 10, para. 4.

[6] Indonesia has advanced this argument with respect to the co-complainants' claims against the application windows and validity periods, realization requirements, and use, sale, and transfer/end-use restrictions for horticultural products and animals and animal products, as well as the seasonal restrictions, storage capacity requirements, Reference Price requirement, and six-month harvest requirement for horticultural products, the domestic purchase requirement for bovine products, both import licensing regimes as a whole, and the domestic sufficiency requirement. *See* Indonesia's Opening Statement, paras. 20, 23; Indonesia's First Written Submission, paras. 71, 78, 82, 84, 89, 90, 95, 112 134 (incorporating arguments under Article 4.2 concerning the application windows and validity periods), 141, 152, 154, 161, 163 (incorporating previous arguments concerning the application windows and validity periods, fixed license terms, and the realization requirement).

1. Article XI:1 Does Not Require a Demonstration of Actual Trade Effects To Establish a Breach

10. As described in the U.S. opening statement and responses to Panel questions, Indonesia's interpretation of Article XI:1 as requiring complainants to quantify the effect of the challenged measures on import volumes is incorrect.[7] Article XI:1 refers to "restrictions . . . on the importation" of products. The ordinary meaning of "restriction" is "[a] thing which restricts someone or something, a limitation on action, a limiting condition or regulation."[8] The Appellate Body in *China – Raw Materials* and *Argentina – Import Measures* found that the term "restrictions" under Article XI:1 thus refers to measures "that are limiting, that is, those that limit the importation or exportation of products."[9] The text of Article XI:1 therefore does not suggest that a complaining Member must prove, in quantified terms, a challenged measure's actual effect on trade flows to demonstrate that such measure is a "restriction" under Article XI:1.[10]

11. The Appellate Body affirmed this interpretation in *Argentina – Import Measures*, finding that a measure's limiting effect on importation "need not be demonstrated by quantifying the effects of the measure at issue; rather, such limiting effect can be demonstrated through the design, architecture, and revealing structure of the measure at issue considered in its relevant context."[11] Thus complainants can demonstrate a measure's inconsistency with Article XI:1 by showing that its design, structure, and operation, in themselves, impose limitations on importation (actual or potential). This interpretation is in accord with previous panels, which have found that Article XI:1 protects competitive opportunities of imports and that, therefore, proving trade effects is not necessary to establish that a challenged measure is inconsistent with

[7] U.S. Opening Statement, paras. 13-15; U.S. Response to Panel Question No. 13, paras. 67-71; U.S. Response to Panel Question No. 26, paras. 87-92; U.S. Response to Panel Question No. 60, paras. 146-150.

[8] *Argentina – Import Measures (AB)*, para. 5.217; *China – Raw Materials (AB)*, para. 319 (citing *Shorter Oxford English Dictionary*, p. 2553).

[9] *Argentina – Import Measures (AB)*, para. 5.217; *China – Raw Materials (AB)*, para. 319.

[10] *See Argentina – Import Measures (Panel)*, para. 6.256 (quoting the finding of the panel in *Argentina – Hides and Leather* that ""Article XI:1, like Articles I, II, and III of the GATT 1994, protects competitive opportunities of imported products, not trade flows" and on this basis rejecting the responding Member's arguments that the complainants' description of the facts could not be considered in determining the consistency of the challenged measure with Article XI:1 "because it is not supported by trade data").

[11] *Argentina – Import Measures (AB)*, para. 5.217.

Article XI:1.[12] This interpretation is also consistent with the Appellate Body's interpretation of other provisions of the GATT 1994 that do not explicitly require a showing of trade effects.[13]

12. Thus, Indonesia's argument that the co-complainants have not proven their claims because they have not demonstrated that certain of the challenged measures have caused an "adverse impact on trade flows"[14] does not undermine the co-complainants' *prima facie* case against any of the challenged measures. Rather, as described in sections IV.B.1-9, IV.D.1-8, and IV.F.1 of the U.S. First Written Submission, and as summarized below, each of the challenged measures, by its design, structure, and operation, imposes a "limiting condition" or "limitation on action" with respect to importation and thus has a "limiting effect" on importation.[15]

2. The United States Has Established That the Challenged Measures are Restrictions on Importation under Article XI:1

13. Under the correct legal standard, as described above, the United States has demonstrated that each of the challenged measures, including those where Indonesia asserts the co-complainants have not sufficiently demonstrated a negative effect on import volumes, are "restrictions" on importation, *i.e.*, impose limitations or limiting conditions on importation, or have a limiting effect on importation.[16]

a. Application Windows and Validity Periods of Required Import Documents

14. The United States has demonstrated that the application windows and validity periods of RIPHs/Recommendations and Import Approvals are restrictions on importation under Article XI:1. Under Indonesia's regulations, products cannot be shipped until after Import Approvals are issued at the commencement of each three- or six-month import period because the Import Approval number is necessary to complete per-shipment verification in the country of origin.[17] Further, the products must clear customs before the last day of the specific import period for

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[12] *See* U.S. Response to Panel Question No. 26, para. 89; *Argentina – Import Measures (Panel)*, para. 6.265; *China – Raw Materials (Panel)*, para. 7.1081; *Colombia – Ports of Entry*, para. 7.240.

[13] *See, e.g.*, *EC – Seal Products (AB)*, para. 5.82 (on Articles I:1 and III:4); *US – Clove Cigarettes (AB)*, para. 176 (on Article III:4); *China – Publications and Audiovisual Products (AB)*, para. 305 (on Article III:4); *Thailand – Cigarettes (Philippines) (AB)*, para. 126 (on Article III:4); *Japan – Alcoholic Beverages II (AB)*, p. 16) (on Article I:1); *Brazil – Retreaded Tyres (AB)*, para. 229 (Article XX); *EC – Bananas III (Article 21.5 – Ecuador II) / (Article 21.5 – US) (AB)*, para. 469 (on Article III:2).

[14] In its first written submission, Indonesia uses various phrases to articulate this argument, including decrease in "total import volumes," an "adverse impact on trade flows," adverse impact on "trade volumes," and a "quantitative limits on imports."

[15] U.S. First Written Submission, secs IV.B.1-9, IV.D.1-8, and IV.F.1.

[16] *Argentina – Import Measures (AB)*, para. 5.217; *China – Raw Materials (AB)*, para. 319.

[17] U.S. First Written Submission, paras. 156-157, 266-271; U.S. Response to Panel Question No. 28, paras. 100-102.

which the Import Approval has been issued.[18] Therefore, due to the design and structure of Indonesia's license application windows and import validity periods, and given the long distances between U.S. and Indonesian ports, there is a period of five to six weeks during each import period when U.S. exporters cannot ship to Indonesia at all.[19] Based on the design, structure and operation of the Indonesian regulations, these measures thus restrict the importation of products into Indonesia in breach of Article XI:1 of the GATT 1994.

15. In addition to the above, and although not required in order to demonstrate a breach, the United States also submitted evidence demonstrating the effect of this no-shipment period on imports, including: (1) statements by horticultural and animal products exporters attesting to the fact that the application windows and validity periods prevent their selling to Indonesia altogether for the last four to six weeks of one validity period and the beginning of the next;[20] (2) trade data showing that, beginning in 2013 and continuing through 2015, shipments of U.S. apples to Indonesia came to a halt towards the end of both semesters, *i.e.*, in December and June;[21] (3) data showing that the gap in shipments did not occur prior to the 2012-2013 season, when the import licensing regulations became effective;[22] and, (4) data showing that the total quantity of U.S. apple exports to Indonesia dropped significantly beginning in the 2012-2013 season and have not returned to pre-2013 levels.[23] New Zealand presented similar evidence.[24]

16. In response, Indonesia made certain assertions concerning the market share of particular U.S.-origin horticultural products. Specifically, Indonesia asserted that the market share of US-

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[18] U.S. First Written Submission, paras. 156-157, 266-271; U.S. Response to Panel Question No. 28, paras. 100-102.

[19] U.S. First Written Submission, paras. 156-157, 266-271; U.S. Response to Panel Question No. 28, paras. 100-102.

[20] U.S. First Written Submission, n.287 (citing Exh. US-21, at 7-8, stating: "Even if permits are issued at the beginning of a validity period, it may take several weeks to complete all the paperwork, plus a month for transportation, so that the first fruit doesn't reach Indonesia until about 6 weeks after the validity period begins. And on the other end, we have to stop selling to Indonesian importers about 6 weeks before the end of the validity period to ensure that the fruit arrives and clears customs by the last day of the period"); Letter to Mr. Bob Macke, Acting Deputy Administrator of the Foreign Agriculture Service, U.S. Department of Agriculture, from Representatives of the American Meat Industry, at 1, Oct. 27, 2015 ("Meat Industry Letter") (Exh. US-44).

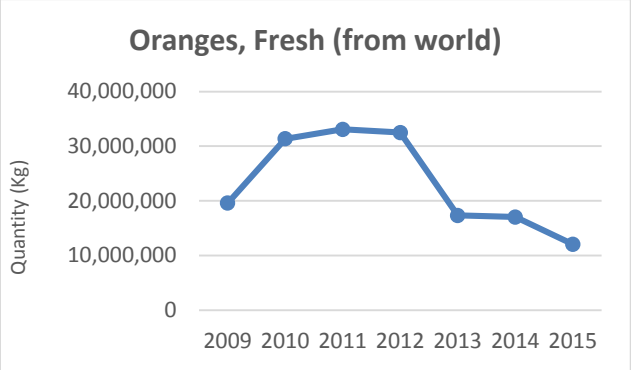
[21] U.S. First Written Submission, n.290 (citing Northwest Horticultural Council, "U.S. Washington State Apple Exports to Indonesia, by Week," Nov. 11, 2015 (Exh. US-50)).

[22] Northwest Horticultural Council, "Expanded U.S. Washington State Apple Exports to Indonesia, by Week," Nov. 11, 2015, Tables 1(a), 1(b) (Exh. US-79).

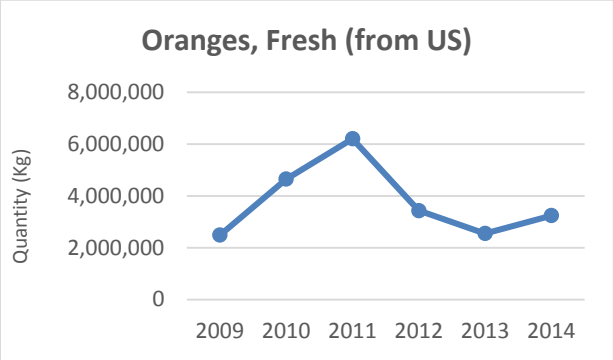
[23] Northwest Horticultural Council, "Expanded U.S. Washington State Apple Exports to Indonesia, by Week," Table 2 (Exh. US-79) (showing that exports of the 2010/2011 and 2011/2012 apple crop years to Indonesia exceeded 2.5 million boxes but that exports of subsequent crop years were 1.5, 1.85, and 1.3 million boxes and that 2015-2016 on track to be the worst year yet).

[24] New Zealand First Written Submission, n.342 (citing Onions New Zealand Exporter Statement (Exhibit NZL-49) and Pip Fruit New Zealand Exporter Statement (Exhibit NZL-50)); New Zealand First Written Submission, para. 216, Annex 4, Annex 5; New Zealand Opening Statement, paras. 20-21.

origin oranges, lemons, frozen potatoes, and grapefruit juice increased from 2012 to 2014.[25] However, the U.S. share of the Indonesian market is not tied to import volumes, as illustrated by the following example. As depicted below, Indonesia's imports of fresh oranges declined slightly in 2012, when Indonesia's original import licensing regime was coming into effect, and then sharply in 2013, when the current regime became effective, falling from 32.5 million kg in 2012 to 17.3 million kg in 2013.[26] Imports continued to fall in 2014 and 2015.



17. Oranges from the United States, by contrast, fell sharply in 2012, then less sharply in 2013, and rose slightly (to just below 2012 levels) in 2014, as shown below.[27]



18. Thus, while the market share of U.S.-origin oranges grew between 2012 and 2015, this does not change the fact that overall imports of oranges fell significantly over the same period. Moreover, the data on Indonesia's orange imports does nothing to contradict the *prima facie* case established by the co-complainants, based on evidence concerning the structure and operation of the requirements, that the application window and validity period requirements impose limiting

[25] Indonesia's Opening Statement, para. 20; *see also* Indonesia's Response to Panel Question No. 18, para. 9; Exhibit IDN-28.

[26] *See* "Total Imports into Indonesia of Listed Fresh Horticultural Products" (Exh. US-87); *see also* Exhibit IDN-28 (depicting the same data in $US and metric tons).

[27] "Total Imports into Indonesia of Listed Fresh Horticultural Products" (Exh. US-89); *see also* Exhibit IDN-28 (depicting the same data in $US and metric tons).

conditions and have a limiting effect on importation and are thus "restrictions" on importation inconsistent with Article XI:1.

b. Realization Requirements

19. The United States has also demonstrated in its submissions that the 80 percent realization requirements for horticultural products and bovine products are restrictions on importation under Article XI:1 of the GATT 1994. Specifically, by requiring importers to import at least 80 percent of the products listed on their permits, on penalty of becoming ineligible to import, the realization requirements give importers a strong incentive to ensure that they do not apply for and obtain Import Approvals for greater quantities of products than they are certain they can profitably import.[28] This, in turn, encourages them to apply to import lower quantities of products than they would if the 80 percent requirement did not apply, which limits overall quantities of imports.[29] Based on the design, structure and operation of the Indonesian regulation, therefore, the realization requirement has a limiting effect on importation in breach of Article XI:1 of the GATT 1994

20. In addition to the above showing, and despite Indonesia's assertions to the contrary, the co-complainants also presented evidence demonstrating that the realization requirements have had an adverse impact on imports.[30] This evidence includes statements by several U.S. exporters attesting to the fact that the realization requirement causes importers "to be conservative in their applications," that is, to "apply for less than if they did not have to worry about meeting 80% of their quota."[31] The United States also presented a statement by ASEIBSSINDO, the Indonesian association of horticultural product importers, confirming that importers' fear of not being able to meet the realization requirement – and of being forced to choose between importing at a loss and becoming ineligible for future permits – has caused them to be "conservative in the amounts they apply to import to make sure they will be able to meet the 80% rule and so avoid sanctions."[32] New Zealand has presented similar evidence.[33]

21. This evidence is not "anecdotal conjecture," as Indonesia asserts.[34] To the contrary, it represents the experience of market actors who regularly operate in the context of Indonesia's import licensing regime and who, therefore, know how the realization requirement operates in

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[28] U.S. First Written Submission, paras. 170-175, 284-287.

[29] U.S. First Written Submission, para. 287; U.S. Response to Panel Question No. 12, para. 54.

[30] Indonesia's First Written Submission, paras. 78, 142.

[31] U.S. First Written Submission, para. 171; Letter from Christian Schlect, President of the Northwest Horticultural Council (NHC) Enclosing Statements from NHC Members, Nov. 3, 2015, at 3 (Exh. US-21) ("NHC Statements"); *id.* at 5; *id.* at 8.

[32] *See* Letter from the Exporter-Importer of Fresh Fruit and Vegetable Indonesian Association (ASEIBSSINDO), Oct. 22, 2015 ("ASEIBSSINDO Letter") (Exh. US-28).

[33] *See* New Zealand's First Written Submission, paras. 166-168; 229-233.

[34] Indonesia's First Written Submission, para. 142.

practice and can attest to its limiting effect on importation. Indeed, even Indonesia, both in its opening statement and in its responses to the Panel's questions at the hearing, acknowledged that the realization requirement *does* place a "limitation[] on the terms identified by importers" in their Import Approval applications.[35] Indonesia also does not contest that imports in any period are limited by the terms in importers' Import Approvals.[36] Thus, Indonesia in effect acknowledges that, by placing a limitation on the terms identified on an importers' Import Approvals, the realization requirement has the effect of restricting imports.

c. Seasonal Restrictions on Horticultural Products

22. The United States also has demonstrated that Indonesia's restrictions on importation of certain horticultural products based on the Indonesian harvest period for those products are inconsistent with Article XI:1. That is, the United States has demonstrated that, under MOA 86/2013, the Ministry of Agriculture establishes periods of time within each six-month semester (or covering the entire semester) during which it restricts or prohibits the importation of certain horticultural products to protect the same domestic products during their harvest periods.[37] In particular, the United States demonstrated that the Ministry of Agriculture has imposed seasonal bans or restrictions on bananas, durian, melons, papaya, and pineapples, *inter alia*, including for the entire year, if the products are harvested year round.[38]

23. Thus, the Ministry of Agriculture has, and exercises, the authority to restrict or prohibit the importation of horticultural products for part or all of a six-month semester to protect the same domestic products during their harvest periods.[39] In late 2015, for example, the Ministry of Agriculture shared with importers its plans for seasonal restrictions in 2016.[40] The restrictions included a complete ban, for the entire year, on shallots, chilies, bananas, pineapples, mangoes, melons, and papayas.[41] Additionally, carrots are restricted to 15 percent of demand, durian is allowed for only three months, and oranges and onions are allowed for only six months.[42] And

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[35] *See* Indonesia's Opening Statement, para. 21 ("Indonesia does not place <u>any</u> limitations on the terms identified by importers *other than the 80 percent realization requirement*, which, I might add, was removed this past September with the adoption of MOT 71/2015"). Italics added.

[36] Indonesia's First Written Submission, paras. 75, 105.

[37] U.S. First Written Submission, para. 180.

[38] U.S. First Written Submission, para. 181; Letter from Dr. Yul Sarry Bahar, Secretary to the Director General for Horticulture to the Secretary to the Director General of Processing and Marketing of Agricultural Products, May 6, 2015 (Exh. US-25) ("May 6 Letter").

[39] U.S. First Written Submission, paras. 179-181.

[40] *See* Ali Abdi, U.S. Dep't of Agriculture, "Horticultural Products Permitted for Import by MOA," Feb. 16, 2016 (Exh. US-91).

[41] Abdi, "Horticultural Products Permitted for Import by MOA" (Exh. US-91).

[42] Abdi, "Horticultural Products Permitted for Import by MOA" (Exh. US-91); *see also* John Hey, "Concern over Indonesian Citrus Imports," *AsiaFruit*, Nov. 18, 2015, http://www.fruitnet.com/asiafruit/article/167132/concern-over-indonesian-citrus-import-rules (Exh. US-92).

such restrictions are not anomalous. In 2015, for example, the Ministry of Agriculture did not issue permits for importation of any citrus fruits except lemons from July to September.[43]

24. Thus, contrary to Indonesia's assertions, the restrictive effect of this measure is clear from its text, structure and operation.[44] Indeed, given the scope of the authority given to the Ministry of Agriculture by Indonesia's laws, under which bans can span an entire year, it is difficult to understand how the measure could fail to have a limiting effect on the importation of horticultural products.

d. Storage Capacity Requirements for Horticultural Products

25. Previous U.S. submissions have demonstrated that the storage capacity and ownership requirements for horticultural products also constitute "restrictions" in breach of Article XI:1 of the GATT 1994. Specifically, the United States has established that Indonesia limits the total quantity of products that an importer can receive permission to import during a six-month semester to the storage capacity owned by that importer.[45] This requirement limits the quantity of products that can be imported during a semester because it does not take into account that horticultural product inventory typically undergoes multiple turnovers in a semester, such that importers could empty and refill the same storage capacity several times.[46] It also means that importers cannot rent or lease storage capacity, as they might do under normal market conditions, which limits imports and increases the cost of importation inconsistent with Article XI:1 of the GATT 1994.[47]

26. Contrary to Indonesia's arguments, co-complainants' claim against the storage capacity requirement is in no way "at odds with the Complainants' claim that importers are habitually underestimating their import volumes because of the 80 percent realization requirement."[48] First, it is possible for there to be two independent causes of an importer's decision to reduce the quantity of products they apply to import. Thus the fact that Indonesia imposes multiple restrictions that cause this result does not mean that they are not *each* a restriction under with Article XI:1. Second, the restrictive effect of different requirements may operate most strongly for different importers at different times. Importers that, for example, own a lot of storage

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[43] Natalie Kotsios, "Department of Agriculture Confirms Indonesia Has Shut Its Borders to Australian Citrus," July 15, 2015, http://www.weeklytimesnow.com.au/agribusiness/horticulture/department-of-agriculture-confirms-indonesia-has-shut-its-borders-to-australian-citrus/news-story/e32282b4e9ad2dc30f20e0ae7637aee0 (Exh. US-93); Hey, "Concern over Indonesian Citrus Imports," *AsiaFruit*, (Exh. US-92); "Growers Left To Find a Market as Indonesia Turns away Citrus," *NewsMail*, July 17, 2015 (Exh. US-27).

[44] *See* Indonesia's First Written Submission, para. 82.

[45] U.S. First Written Submission, paras. 187-189; U.S. Response to Panel Question No. 12, para. 65.

[46] U.S. First Written Submission, paras. 189-190.

[47] U.S. First Written Submission, para. 190; U.S. First Written Submission, para. 190; NHC Statements, at 6 (Exh. US-21) (explaining that "importers can rent storage capacity" and that there is, therefore, "no business reason why import quotas would be limited based on importers' cold storage capacity").

[48] Indonesia's First Written Submission, para. 85.

capacity might be most affected by the realization requirement, while importers hoping to import more than their owned storage capacity might be affected most by the storage capacity requirement. Regardless, the requirements both work to force importers to restrict their Import Approval applications and thereby limit horticultural product imports into Indonesia.

27. Further, the United States has also introduced evidence demonstrating that, in practice, the storage capacity restrictions themselves adversely affect import volumes.[49] Specifically, the co-complainants submitted a statement from ASEIBSSINDO attesting to the fact that importers are "restricted in the amount they can order" by the requirement that they own storage capacity deemed sufficient to hold, at one time, all the horticultural products they would apply to import throughout the entire semester.[50] The statement explains that the requirement "does not take into account the product turnover during a six month period that an importer would have in the ordinary course of business."[51]

e. Use, Sale, and Transfer Restrictions for Horticultural Products

28. The co-complainants have demonstrated that Indonesia's use, sale, and transfer restrictions on the importation of horticultural products are restrictions on importation under Article XI:1 of the GATT 1994. Specifically, the United States demonstrated in its first written submission that: (1) horticultural products imported for consumption *must* be sold through distributors and *cannot* be sold to consumers or retailers; and, (2) horticultural products imported for production but unused *cannot* be sold or transferred to another entity.[52]

29. The first restriction mandates an additional, unnecessary level – and therefore additional costs – in the supply chain for imported horticultural products.[53] The second restriction creates waste and unnecessarily increases the cost of imported products because producer-importers of horticultural products ("PIs") must predict precisely the quantity of imported products that they will use in their production process for each period. If they import too little, their production is disrupted; if they import too much, they must destroy or store any excess product.[54]

30. It is a basic rule of economics that if the input costs of producing or obtaining a product increase, the supply of the product in that market will decrease. Thus, if imported horticultural products are made unnecessarily costly, the supply curve for such products will shift such that lower levels of imports are brought into Indonesia. A recent report published by the World

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[49] Indonesia asserted that the co-complainants had not done so. *See* Indonesia's First Written Submission, para. 84; *see* Indonesia's Opening Statement, para. 23.

[50] ASEIBSSINDO Letter (Exh. US-28).

[51] ASEIBSSINDO Letter (Exh. US-28); *see* NHC Statements, at 6 (stating that, "In reality . . . fruit is moving in and out of importers' storage capacity constantly during an import period").

[52] U.S. First Written Submission, para. 193.

[53] Stephen V. Marks, at 26, *Indonesia Horticultural Imports and Policy Responses: An Assessment*, Sept. 2012, USAID/SEADI (Exh. US-53).

[54] U.S. First Written Submission, para. 195.

Economic Forum confirmed that if supply chain barriers such as those at issue here were eliminated, trade would increase dramatically.[55]

31. Thus, contrary to Indonesia's assertions, the United States has demonstrated that these restrictions have a limiting effect on the "amount of imports for horticultural products."[56]

f. Reference Price Requirements for Chilies and Shallots

32. Contrary to Indonesia's argument, the United States has provided ample and sufficient evidence demonstrating that the Reference Price requirements for chilies and shallots constitute restrictions inconsistent with Indonesia's obligations under Article XI:1 of the GATT 1994.[57]

33. The U.S. First Written Submission demonstrated that the Reference Price requirements impose an absolute prohibition on the importation of chilies and fresh shallots if the Indonesian market prices of these products fall below their respective Reference Prices.[58] The restrictive effect of such a prohibition is obvious on its face. Additionally, the Reference Price has a limiting effect on importation at all times because the threat of such a broad prohibition, if the Reference Price is reached, reduces the incentives for importation.[59] Importers cannot predict price fluctuations, and the possibility of a ban on the covered products increases the risks associated with importing, thereby increasing the potential cost of contracting for these products.

34. However, Indonesia attempts to obscure this fact by arguing that the Reference Price system "has had little or no impact on imports or the issuance of import licenses," and presenting a chart purporting to show that imports of chilies and fresh shallots into Indonesia were below the level of Import Approvals issued in 2013 and 2014.[60] In fact, Indonesia's logic is inverted.

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[55] World Economic Forum, *Enabling Trade: Valuing Grown Opportunities*, at 4 (2013) (Exh. US-94).

[56] Indonesia's First Written Submission, paras. 90, 156.

[57] *See* Indonesia's Response to Advance Panel Question No. 31, para. 31; Indonesia's Opening Statement, para. 25; Indonesia's First Written Submission, para. 93. Indonesia does not appear to have made a similar argument with respect to the Reference Price requirements for beef products. However, many of the arguments would be analogous.

The United States also notes that, in its response to Panel questions, Indonesia asserts that the Reference Price requirements for chilies and shallots are not "automatically" activated when the market prices fall below the Reference Prices. *See* Indonesia's Response to Advance Panel Questions, No. 13, para. 4. This directly contradicts the text of MOT 16/2013, which states: "In the event that the market price of chili . . . and fresh shallots for consumption . . . is below the Reference Price, then the importation of chili . . . and fresh shallots for consumption . . . *is postponed* until the market price again reaches the Reference Price" (emphasis added). MOT 16/2013, as amended by MOT 47/2013, art. 14B (JE-10). Thus, imports of chilies and shallots are halted until their market prices rise to the Reference Price. Regardless of whether an investigation takes place before Indonesia suspends importation, the measure, on its face, constitutes a restriction on importation and is WTO-inconsistent "as such."

[58] U.S. First Written Submission, paras. 199-200.

[59] U.S. Response to Panel Question No. 39, para. 110; U.S. First Written Submission, paras. 314-315.

[60] Indonesia's Opening Statement, para. 25. The United States has no way to evaluate the accuracy of the data presented in the chart since Indonesia submitted no exhibit or citation supporting the information. We note,

If the Reference Price prohibition were triggered, imports of chilies and shallots would be stopped cold; consequently, imports for that period *would be* below the quantity of products listed on Import Approvals for that period. (Other restrictions could also account for the discrepancy, however, including the seasonal restrictions that the Ministry of Agriculture has imposed on chilies and shallots,[61] as well as the application window and validity period requirements.)

35. Thus Indonesia's data, even if accurate, would provide no support for the argument that the Reference Price requirements were not restricting imports and, therefore, do not rebut the *prima facie* case established by the co-complainants that the Reference Price requirements are a restriction on importation under Article XI:1 of the GATT 1994.

g. Six-Month Harvest Requirement for Horticultural Products

36. The United States also has shown that Indonesia's requirement that all imported fresh horticultural products must have been harvested less than six months prior to importation is a restriction on importation under Article XI:1 of the GATT 1994.

37. Specifically, the United States demonstrated that Indonesia prohibits the importation of horticultural products that do not meet the six-month harvest requirement and penalizes importers that fail to comply with it.[62] It is uncontested that certain fresh horticultural products – apples are one example – can be safely stored and remain fresh for consumption for more than six months.[63] Consequently, these products, although harvested over a period of a few months, can be shipped to global markets year round. Under the six-month requirement, however, Indonesian importers are restricted in their ability to import such products during the second half of the crop year. For U.S. apples, this means that imports are restricted from about May to October, since the harvest period is generally September-October. The United States also presented statements from apple producers attesting to the limiting effect of the requirement on exports to Indonesia.[64]

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however, that Exhibit US-87 presents total imports into Indonesia of the fresh horticultural products covered by Indonesia's import licensing regime and that, for the years 2013 and 2014, these figures (in kilograms) were 243,926 kg and 29,500 kg, respectively. Indonesia's figure for 2013 of 232 tons (we assume metric tons) would be equivalent to 232,000 kg.

[61] U.S. First Written Submission, paras. 62-63; May 6 Letter (Exh. US-25) (recommending no shallot/red onion and no chili imports for the second semester of 2015); Abdi, "Horticultural Products Permitted for Import by MOA" (Exh. US-91) (showing that the Ministry of Agriculture communicated to importers that it would not allow chili or shallot imports in 2016).

[62] U.S. First Written Submission, paras. 205-206.

[63] U.S. First Written Submission, para. 207; Indonesia's First Written Submission, paras. 150-151 (acknowledging that there are horticultural products "can be stored for more than six months, i.e. apples, when properly refrigerated").

[64] NHC Statement, at 4 (Exh. US-21).

38. Thus, the United States has, in fact, demonstrated that the six-month requirement has a limiting effect on importation and, indeed, on import volumes.[65]

h. End-Use Restrictions for Animal Products

39. The co-complainants also have demonstrated that the end-use restrictions on the importation of animal products are restrictions on importation inconsistent with Article XI:1.[66] Additionally, contrary to Indonesia's argument, the United States has demonstrated that these restrictions do, in fact, impose quantitative limits on imports of the covered products.[67]

40. It is uncontested that the animal products listed in Appendix II to MOT 46/2013 and MOA 139/2014 (non-beef meats and edible offals) cannot be imported for sale in modern markets and that the animal products listed in Appendix I to MOT 46/2013 and MOA 139/2014 (beef meat, and edible beef offals) cannot be imported for any retail sale.[68] And the co-complainants have provided evidence demonstrating that Indonesian consumers still do at least half their food shopping at traditional retail outlets.[69] This number is even higher for animal products, with a 2010 survey showing that Indonesian consumers make 70 percent of their fresh meat purchases at traditional markets.[70]

41. Thus, imported animal products – Appendix I and Appendix II products – are completely denied access to at least half and as much as 70 percent of the Indonesian consumer market, and the restrictions on Appendix I products are even more extensive because of the ban on sale to all retail outlets. The restrictive effect of this measure is clear – where imported products are allowed access to only a small fraction of a market, they have fewer competitive opportunities, which has a limiting effect on importation in breach of Article XI:1 of the GATT 1994.

i. Domestic Purchase Requirement for Beef Products

42. In previous submissions, the co-complainants have demonstrated that the domestic purchase requirement for beef products constitutes a restriction on importation under Article XI:1 of the GATT 1994.

43. Under this requirement, Indonesia requires importers to purchase local beef in an amount equivalent to three percent of their total beef imports. Therefore, as the co-complainants have

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[65] *See* Indonesia's First Written Submission, para. 151 (arguing this was not the case).

[66] U.S. First Written Submission, paras. 291-297.

[67] *See* Indonesia's First Written Submission, para. 165.

[68] U.S. First Written Submission, para. 292; Indonesia's First Written Submission, para. 109.

[69] U.S. First Written Submission, para. 295; *See* Rohit Razdan et al., McKinsey & Co, *The Evolving Indonesian Consumer*, at 16 (November 2013) (Exh. US-47); Arief Budiman et al., McKinsey & Co., *The New Indonesian Consumer*, at 11 (December 2012) (Exh. US-48).

[70] *See* Rahwani Y. Rangkuti & Thom Wright, U.S. Department of Agriculture Foreign Agriculture Service, *GAIN Report No. ID1450: Retail Foods 2014*, at 5-6, Dec. 19, 2014 (Exh. US-58).

demonstrated, based on the text of the measure and other sources, the domestic purchase requirement limits the permissible quantity of beef imports based on the supply of local beef that is available for purchase towards the requirement.[71]

44. The co-complainants also demonstrated the practical effect of this requirement on imports, showing that compliance with it is burdensome because domestic beef is in short supply in Indonesia and, consequently, importers have difficulty finding and purchasing local beef amounting to three percent of the quantity of beef products they wish import.[72] Importers are, therefore, forced to reduce the quantity of products they apply to import. Additionally, the requirement further reduces imports by adding a significant (particularly in light of the scarcity and high price of beef) and unnecessary cost to the importation of beef products. Indeed, a recent report by the World Bank found that local content requirements tend to have a significant limiting effect on trade for this reason.[73]

45. Indonesia asserts that the domestic purchase requirement for beef products is not a "quantitative restriction" because there is "plenty of domestic supply" to meet the requirement and thus "no reason to believe that importers will be forced to reduce their anticipated imports due to an inability to source 3 percent of their products locally."[74] Indonesia has provided no evidence to substantiate this assertion, even when asked to do so by the Panel, asserting that Indonesian slaughterhouses produce beef daily but providing no evidence suggesting that they do so in quantities sufficient to meet 3 percent of Indonesian demand after direct sales to consumers are accounted for.[75] To the contrary, all of the relevant evidence on the record confirms that beef is scarce in Indonesia and prices are high.[76] In any event, even if Indonesian producers could provide abundant domestic beef for purchase by importers, this would not eliminate the restrictive effect of the domestic purchase requirement, which exists on the face of the Indonesian regulations, irrespective of actual production volumes or trade flows.

46. Thus, Indonesia has not introduced any evidence rebutting the *prima facie* case made by the co-complainants that the domestic purchase requirement limits the quantity of permissible beef imports into Indonesia and therefore breaches Article XI:1 of the GATT 1994.

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[71] U.S. First Written Submission, paras. 300, 302.

[72] U.S. First Written Submission, para. 303; Wright, *GAIN Report No. ID1527: Beef and Horticultural Import License Update*, at 2 (Exh. US-40).

[73] World Bank, *Enabling Trade: Valuing Growth Opportunities*, at 10 (Exh. US-94).

[74] Indonesia's First Written Submission, para. 112.

[75] Indonesia's Response to Advance Panel Question No. 26, para. 26.

[76] Wright, *Beef and Horticultural Import License Update*, at 2 (Exh. US-40); *see* Michael Taylor, "Indonesia Self-Sufficiency Push Will Drive up Beef Prices – Industry," *Reuters*, March 4, 2015 (Exh. US-8); "Market Fundamentals Force Government's Hand in Beef Brouhaha," *Jakarta Globe*, Aug. 10, 2015 (Exh. US-50); Tom Allard, "Indonesia Increases Cattle Permits Amid Soaring Beef Prices," *Sydney Morning Herald*, Aug. 12, 2015 (Exh. US-61); *see also* New Zealand First Written Submission, para. 184.

j. Import Licensing Regimes as a Whole

47. For all the reasons discussed in this section, the co-complainants also have demonstrated that Indonesia's import licensing regimes for horticultural products and animals and animal products, as a whole, are restrictions on importation under Article XI:1 of the GATT 1994.[77]

48. Indeed, due to the combined operation and interaction of its different requirements, the regimes, as a whole, are even more restrictive than their components, taken singly. In particular, the regimes include requirements – including the realization requirement, storage capacity requirement, seasonal restrictions, domestic purchase requirement, and Reference Price requirements – that cause importers to reduce the type or quantity of products they apply to import. The fixed license terms requirements then strictly limits imports to the products listed on importers' Import Approvals for a given period. Additionally, the fixed license term requirements and the application windows and validity periods further restricts imports by preventing importers from responding to market forces by importing different products, or on a different time schedule, than they had foreseen.

49. The inability to respond to market forces, in addition to other requirements of the regimes, such as the use, sale, and transfer requirements and the storage capacity requirements (for horticultural products) and the domestic purchase requirement (for beef products), also discourage importation by adding unnecessary costs.[78]

50. Finally, contrary to Indonesia's assertions,[79] the co-complainants have also submitted copious evidence, including statements by exporters and importers, Indonesian government documents, studies, and data demonstrating that the regimes "operate[] to restrict the quantity of imports" of the covered products.[80] Thus, Indonesia has not rebutted the *prima facie* case made by the co-complainants that each of Indonesia's import licensing regimes, as a whole, constitutes a restriction on importation in breach of Article XI:1 of the GATT 1994.

k. Sufficiency of Domestic Supply Requirement

51. Finally, co-complainants have also demonstrated that the requirement in Indonesia's laws and regulations that all importation is conditioned on the government-determined insufficiency of domestic production to meet consumption needs is a restriction under Article XI:1. The legal provisions establishing this requirement explicitly make all importation conditional on the

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[77] U.S. First Written Submission, paras. 211-215, 318-325.

[78] *See* U.S. First Written Submission, para. 324.

[79] *See* Indonesia's First Written Submission, para. 95 (concerning the horticultural products regime). The basis for Indonesia's assertion that the animals and animal products regime is not a restriction is entirely derivative of Indonesia's defenses of the individual prohibitions and restrictions. *See id*. para. 170. However, since Indonesia argued that the co-complainants failed to provide import data for several of the individual prohibitions and restrictions on animals and animal products, we address the restrictive effect of the regime as a whole in this section.

[80] *See supra* paras. 15, 20, 22-23, 27**Error! Reference source not found.**, 29-30, 32, 37, 40, 43.

government determining that domestic production is insufficient to satisfy domestic demand.[81] If domestic production is deemed sufficient, imports are prohibited altogether; if that is not the case, imports are limited to the extent of any "domestic shortfalls."[82] The limiting effect of this requirement is clear on its face.

52. Additionally, and contrary to Indonesia's arguments,[83] the co-complainants have submitted evidence demonstrating the domestic sufficiency requirement's limiting effect on imports. First, the domestic sufficiency requirement is, to a great extent, the policy objective behind Indonesia's import licensing regimes for horticultural products and for animals and animal products.[84] Therefore, the adverse impacts on trade flows of the regimes as a whole also reflects this requirement.[85] Second, the Indonesian government has limited imports directly pursuant to this requirement. In 2015, for example, the Ministry of Trade cut the import quota of cattle from Australia (Indonesia's main supplier of cattle) to 50,000 head for the third quarter, a decrease from 250,000 head for the second quarter.[86] In explaining this requirement, the government explicitly invoked that domestic supply was "sufficient."[87]

53. Thus, co-complainants have demonstrated that the domestic sufficiency requirement has a limiting effect on importation and, as such, is a "restriction" under Article XI:1.

3. Available Trade Data Confirms the Restrictive Effect of the Challenged Measures

54. The limiting effect on importation of all of the challenged measures is clear from their text, structure, and operation. And evidence of actual trade effects is not required to establish a breach of Article XI:1 of the GATT 1994. However, the available trade data provides additional evidence that the challenged measures do, in fact, have a limiting effect on the level of imports of covered products entering Indonesia. Thus, the trade effects of these measures also confirm that the measures have a limiting effect on importation, inconsistent with Article XI:1 of the GATT 1994.

55. The challenged measures concerning horticultural products went into effect in 2012 and 2013.[88] In those years, imports of *every one* of the twenty-one fresh horticultural products

[81] U.S. First Written Submission, para. 368.

[82] U.S. First Written Submission, paras. 367-368.

[83] Indonesia's First Written Submission, para. 161.

[84] U.S. First Written Submission, paras 12-19, 82-84.

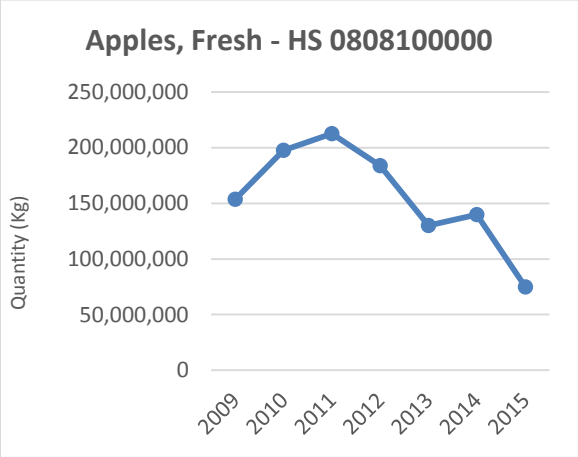
[85] *See supra* secs. II.A.2.a-II.A.2.j; *infra* sec. II.A.3.

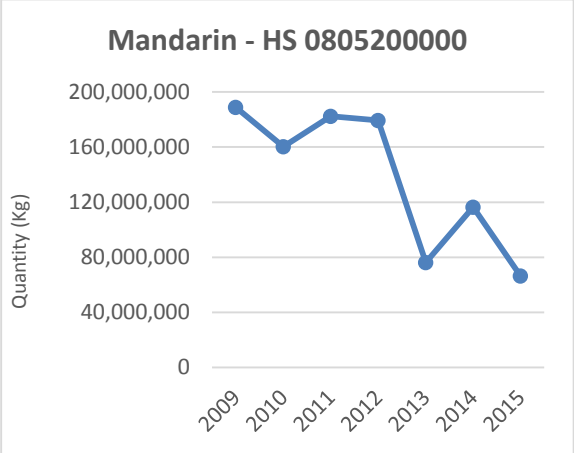
[86] Shalailah Medhora, "Indonesia's 80% Cut in Cattle Imports Takes Australian Industry by Surprise," *The Guardian*, July 13, 2015 (Exh. US-60); "Market Fundamentals Force Government's Hand in Beef Brouhaha," *Jakarta Globe* (Exh. US-59).

[87] "Market Fundamentals Force Government's Hand in Beef Brouhaha," *Jakarta Globe* (Exh. US-59).

[88] *See* U.S. First Written Submission, secs. III.A.1-III.A.3 (describing how the original import licensing regime, imposed in 2012, established certain restrictions and prohibitions that continue in effect under the current

subject to the import licensing regime – with the single exception of lemons – declined sharply, and remained below peak levels in 2014 and 2015.[89] The data for apples and mandarins, shown below, are typical.[90] Imports were steady or increasing from 2009-2011. They declined in 2012, declined steeply in 2013, and have remained below 2009-2011 levels in 2014-2015.





56. For example, in 2015, Indonesian imports of apples and mandarins were 35.2 and 36.7 percent, respectively, of what they were in 2011. The data for fresh horticultural products overall is even starker: Indonesia's imports in 2015 of the twenty-one covered horticultural products was only 12.8 percent of what it was in 2011.[91]

57. Trade data on Indonesian imports of most of the fifteen processed horticultural products subject to the challenged measures exhibits a similar pattern, dropping sharply in 2012 and 2013 and remaining below 2011 levels in 2014 and 2015. Indonesian imports of processed longans and chili sauce, shown below, are just two examples.[92] Imports of these products in 2015 had fallen to 17.0 and 5.7 percent of their 2011 levels.

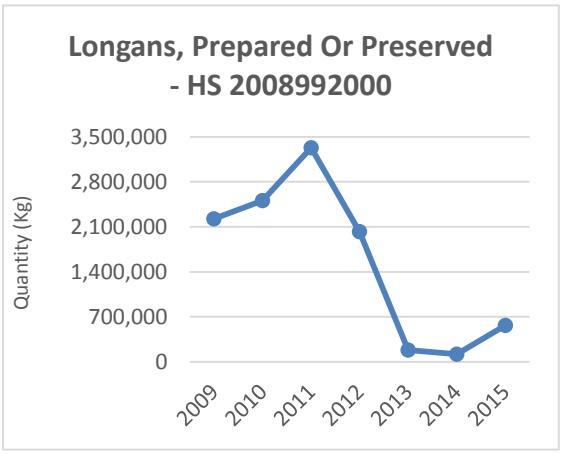
regime); "Effective Dates of Indonesia's Import Licensing Laws and Regulations" (Exh. US-73) (showing that the regulations establishing the current regime became effective in 2013).

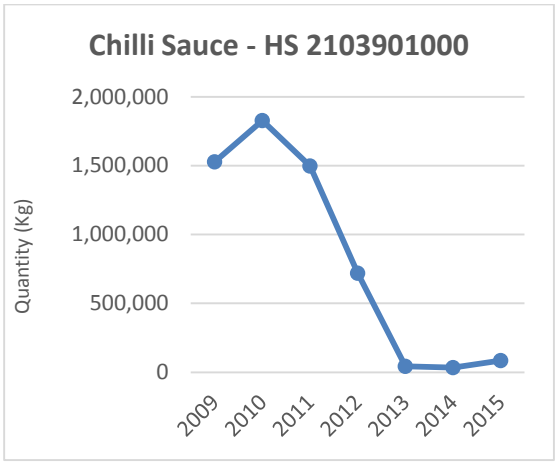
[89] *See* "Total Imports into Indonesia of All Listed Fresh Horticultural Products" (Exh. US-87) (data drawn from Global Trade Atlas (accessed Feb. 11, 2016) (for 2009-2014 data); Statistics Indonesia, http://bps.go.id/all_newtemplate.php (accessed Feb. 16, 2016) (for 2015 data)).

[90] *See* "Total Imports into Indonesia of All Listed Fresh Horticultural Products" (Exh. US-87).

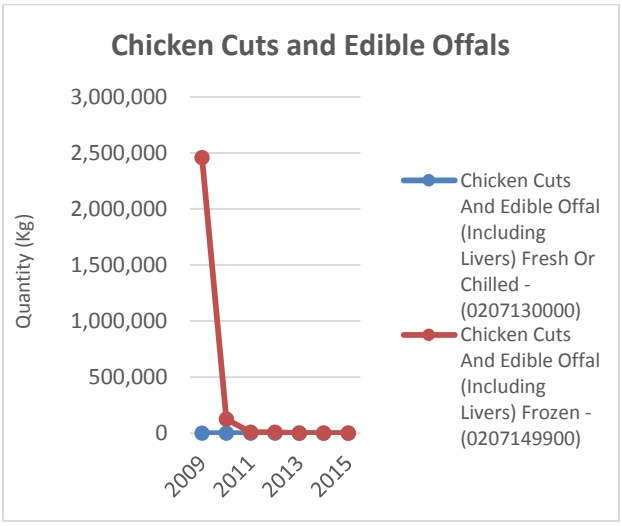
[91] "Total Imports into Indonesia of All Listed Fresh Horticultural Products" (Exh. US-87).

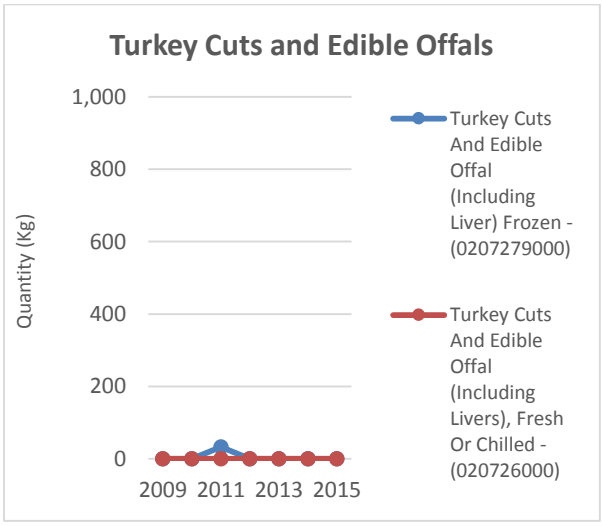
[92] *See* "Total Imports into Indonesia of Listed Processed Horticultural Products" (Exh. US-88) (data drawn from Global Trade Atlas (accessed Feb. 11, 2016) (for 2009-2014 data); Statistics Indonesia, http://bps.go.id/all_newtemplate.php (accessed Feb. 16, 2016) (for 2015 data)).





58. The available trade data for animals and animal products also confirms the limiting effect of the challenged measures on imports. For example, Indonesian imports of chicken cuts and edible offal and turkey cuts and edible offal, both which have been unlisted (*i.e.*, prohibited) products since the original import licensing regulations became effective in 2011, have been essentially zero since that time.[93]





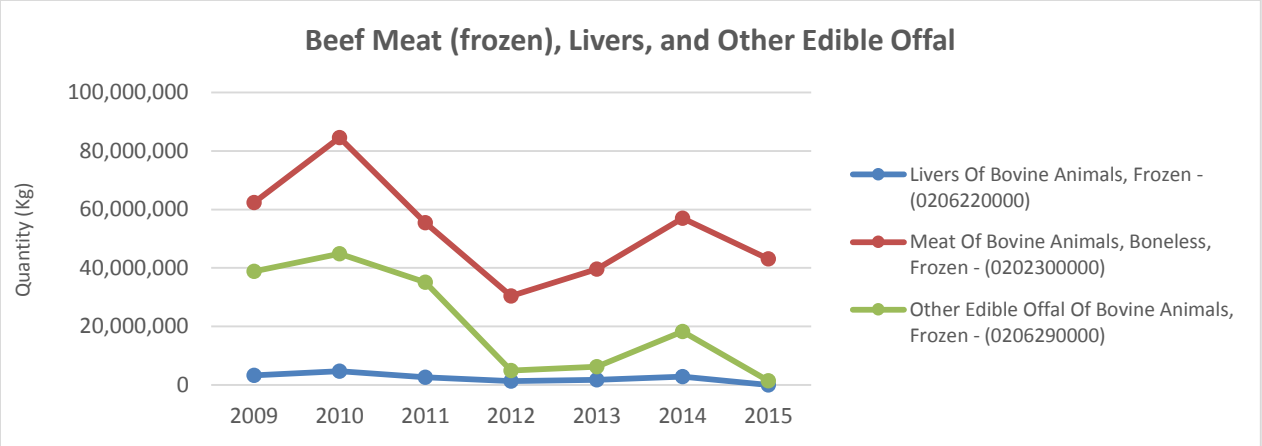
59. Imports of listed animal products exhibited a pattern similar to horticultural products, dropping steeply in 2011 and 2012, when the import licensing regimes became effective,[94] and remaining below peak levels for 2013-2015. Imports of certain beef meat and offals, shown below, are illustrative.[95] In 2015, imports of frozen boneless beef meat were 51 percent of what

[93] "Total Imports into Indonesia of Certain Animal Products" (Exh. US-89) (data drawn from Global Trade Atlas (accessed Feb. 11, 2016) (for 2009-2014 data); Statistics Indonesia, http://bps.go.id/all_newtemplate.php (accessed Feb. 16, 2016) (for 2015 data)).

[94] *See* U.S. First Written Submission, secs. III.B.1-III.B.3.

[95] "Total Imports into Indonesia of Certain Animal Products" (Exh. US-89).

they were in 2010, and imports of bovine offal and livers were 3.2 and .15 percent of their 2010 levels, respectively.



60. Available trade data also confirms the restrictive effect of some of the individual challenged measures.

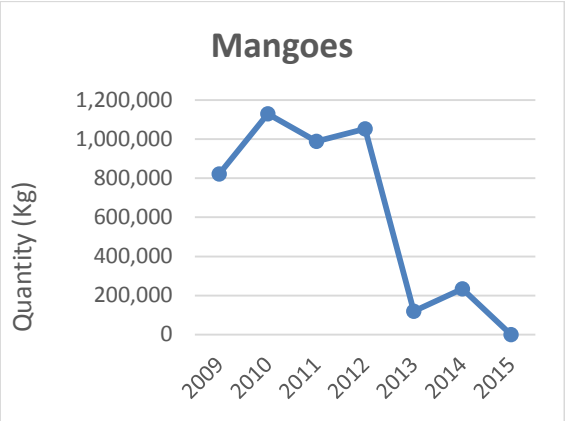
61. With respect to the seasonal restrictions on horticultural products, for example, trade data confirms that imports of products on which the Ministry of Agriculture has imposed a seasonal ban have fallen precipitously – in some periods to near zero – since the Ministry of Agriculture began exercising this authority in 2013.[96] Importation of mangoes, for example, fell from 1.0 million kilograms in 2011 and 2012 to 119,080 kilograms in 2013, and mangoes were not imported at all during the first semester.[97] Imports of bananas, durian, melons, pineapples, and watermelon exhibited a similar pattern, dropping dramatically in 2013 and remaining low in 2014 and 2015.[98]

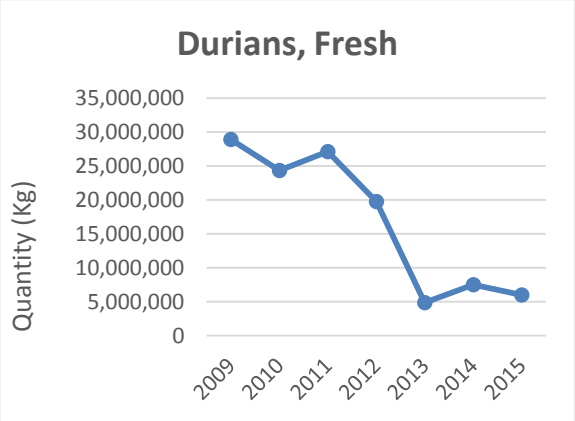
[96] U.S. First Written Submission, paras. 181-182; *see* "Indonesia Bans Import of 11 Horticultural Products," *Freshplaza.com*, Jan. 25, 2013, http://www.freshplaza.com/article/105352/Indonesia-bans-import-of-11-horticultural-products (Exh. US-90).

[97] *See* "Query: Importation of Mangoes, from 2011-2015, Monthly," *BPS – Statistics Indonesia* (accessed Oct. 22, 2015) (Exh. US-51).

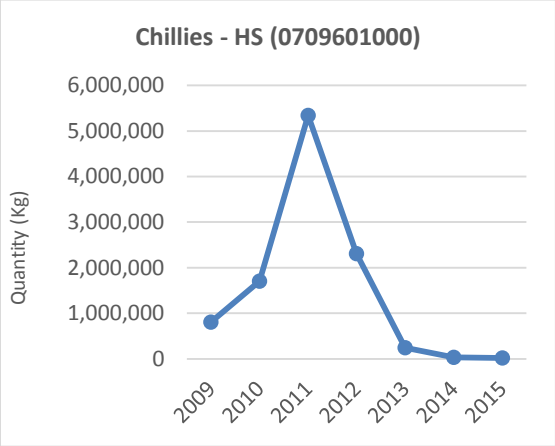
[98] "Query: Import data for bananas, durians, melons, and pineapples, from 2011-2015," *BPS – Statistics Indonesia* (accessed Oct. 22, 2015) (Exh. US-52).

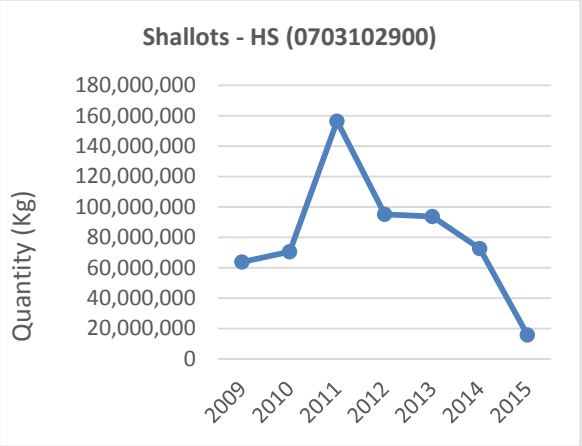
62. The charts below depict two examples of this pattern[99]:





63. Similarly, with respect to the Reference Price for chilies and shallots, the available trade data for these products shows that imports have fallen dramatically since the import licensing regime, including these Reference Price requirements, went into effect in 2012/2013.[100]





64. Moreover, Indonesia's statement that the Reference Price for chilies and shallots was "in place in 2015," combined with the import and price data for that period, further confirms the restrictive effect of the Reference Price requirement.[101] According to Exhibit IDN-31, the market price for chili was below the Reference Price from February-April and from October-November, and the market price for shallots was below the Reference Price from January-

[99] "Total Imports into Indonesia of Listed Fresh Horticultural Products" (Exh. US-87).

[100] "Total U.S. Imports into Indonesia of All Listed Fresh Horticultural Products" (Exh. US-87).

[101] Indonesia's Response to Panel Question No. 37, para. 26.

February and from July-December.[102] The chart below depicts imports of chili and shallots, by month, with the months where the market price was below the Reference Price highlighted.

Indonesia's Imports of Chilies (07096010) and Shallots (07031029) in Kilograms[103]

	Jan.	Feb.	Mar.	Apr.	May	June	July	Aug.	Sept.	Oct.	Nov.	Dec
Chili	1.231	0	0	0	0	13.775	0	0	0	0	0	0
Shallot	0	836.0	1,872.0	3,398.4	3,834.4	5,828.4	0	0	0	0	27.0	0

65. This data shows that, for all the months when the market prices of chili or shallots were below the Reference Prices, imports were zero or nearly zero. Indonesia's own evidence thus confirms the restrictive effect of the Reference Price requirements on chili and shallot imports.

66. The restrictive effect of the six-month requirement for horticultural products is also clear from the trade data the United States has presented. As shown by Exhibit US-79, exports of Washington State apples to Indonesia for the 2012-2013 crop year, when Indonesia's import licensing regime for horticultural products went into effect, fell from 2.7 and 2.5 million boxes, for the two previous crop years, to 1.5 million boxes.[104] This represented a decline of 38.7 percent from the previous year. Breaking down these figure into the first and second half of the crop years, however, it is clear that most of the decline occurred in the *second* half of the crop year. As set out in the table below, shipments for the first half of the year dropped by 33.6 percent for the 2012/2013 year, while shipments for the second half of the year dropped 45.4 percent. For the 2014/2015 crop, shipments for the first half of the year were down 32.3 percent from 2011/2012 levels, while shipments for the second half were down 64.1 percent from the same year. For 2014/2015, 75.4 percent of all apples shipped to Indonesia were shipped in the first half of the crop year, compared to 57.3 percent for the 2011/2012 year.

Washington State Apple Shipments to Indonesia (boxes), by Crop Year

	2011-2012	2012-2013	2013-2014	2014-2015
First Half Shipments	1,444,191	959,351	1,266,117	978,588
% change prev. year		-33.6%	+32.0%	-22.7%
% change 2011-2012		-33.6%	-12.3%	-32.2%
Second Half Shipments	1,076,905	587,567	584,387	335,479
% change prev. year		-45.4%	-.5%	-42.3%
% change 2011-2012		-45.4%	-45.7%	-68.8%
Total Boxes	2,521,096	1,546,918	1,850,504	1,314,067
% change prev. year		-38.7%	+19.6%	-29.0%

[102] Exhibit IDN-31.

[103] "Indonesian Imports of Chilies and Shallots, 2009-2015" (Exh. US-95); *see also* Exh. IDN-29 (providing the same data for the first four months of the year).

[104] "Expanded U.S. Washington State Apple Exports to Indonesia, by Week" (Exh. US-79).

% change 2011-2012		-38.7%	-26.7%	-47.9%
% Shipped in First Half	57.3%	62.0%	68.42%	74.5%

67. Thus, while not necessary to the co-complainants' *prima facie* case under Article XI:1, all the available trade data, including the data submitted by Indonesia, confirm the restrictive effect of the challenged measures.

B. Indonesia's Argument that Certain Measures Are Not "Maintained" by Indonesia Is Based on an Incorrect Legal Premise and Is Factually Incorrect

68. Indonesia also asserts that many of the co-complainants' claims fall outside the scope of Article XI:1 of the GATT 1994 because the measures were "self-imposed" decisions by private actors and, thus, are not "instituted or maintained" or "maintained, resorted to, or reverted to" by the Government of Indonesia.[105] Indonesia made variations of this argument regarding the application window and validity period restrictions, fixed license term restrictions, realization requirement restrictions, and storage capacity restrictions.[106]

69. Indonesia's arguments regarding the effect of private actions on co-complainants' claims are without merit because they are based on a misinterpretation of Article XI:1 and mischaracterizations of Indonesia's own measures.

1. Measures that Operate by Compelling Private Actors To Make Trade-Restrictive Choices Are Within the Scope of Article XI:1

70. The legal premise on which Indonesia's argument is based – that a "measure" that is "the result of the decisions of private actors" is outside the scope of Article XI:1 – is incorrect. The Appellate Body in *Korea – Beef* considered this argument in the context of Article III:4 of the GATT 1994 and found that "the intervention of some element of private choice does not relieve [a Member] of responsibility under the GATT 1994 for the resulting establishment of competitive conditions less favourable for the imported product than for the domestic product."[107]

71. Previous panels have found that this principle also applies to Article XI:1 of the GATT 1994. The panel in *India – Autos*, for example, found that the challenged measure, a trade-balancing requirement, was inconsistent with Article XI:1 because, although it "does not set an absolute numerical limit on the amount of imports," it does "limit the value of imports that can be made to the value of exports that the signatory intends to make over the life of the MOU" because, "in reality . . . the limit on imports set by this condition is induced by the practical

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[105] *See* Indonesia's First Written Submission, paras.119, 52.

[106] *See* Indonesia's First Written Submission, paras. 67, 134 (concerning the application windows and validity periods); 74, 104, 138 (concerning the fixed license terms measure); *id.* para. 107 (concerning the realization requirement); *id.* para. 86, 147 (concerning the storage capacity requirement).

[107] *Korea – Various Measures on Beef (AB)*, para. 146.

threshold that a signatory will impose on itself as a result of the obligation to satisfy a corresponding export commitment."[108]

72. Similarly, the panel in *Argentina – Import Measures* found that Argentina's trade balancing requirement breached Article XI:1 even when private actors, "in order to continue to import, *opt* for increasing their level of exports," because the requirement "imposes an artificial threshold which restricts the level of imports of economic operators irrespective of commercial considerations."[109] Indeed, the panel considered evidence of private actors' proposals to "self-limit imports," undertake new investment and export activities, and limit repatriation of profits, and found that these supposed private actions "did not come about as a result of business decisions" but, rather, "were brought about in response to the requirements imposed by Argentina."[110] As described in the next section, Indonesia's measures similarly require market actors to make non-commercial choices in response to regulatory requirements, and therefore do not evade scrutiny under Article XI:1 of the GATT 1994.

2. The "Choices" of Private Market Actors To Limit Imports Into Indonesia Are Compelled By Indonesia's Restrictive Measures

73. With respect to the factual aspects of Indonesia's private action arguments, Indonesia's suggestion that the measures at issue in this dispute are "the result of decisions of private actors" is inaccurate. In all cases, Indonesia's assertion fails because the supposed "choices" that importers make are compelled not by business decisions but by Indonesia's measures.

a. Application Windows and Validity Periods of Required Import Documents

74. Regarding the application windows and validity periods, Indonesia is wrong that these requirements do not "cut off imports at the beginning or end of the validity period" and that importers of their own accord decide not to ship their products after a certain date.[111] Under Indonesia's import licensing regulations, imported horticultural products or animal products that arrive after the end of the period for which their import approval is valid will not be accepted into Indonesia; according to the regulations, they will be re-exported (for processed horticultural products and animal products) or destroyed (for fresh horticultural products).[112] Thus, exporters must stop shipping far enough in advance of the end of the validity period for their goods to clear

[108] *India – Autos*, para. 7.268.

[109] *Argentina – Import Measures (Panel)*, paras. 6.256 (emphasis added).

[110] *Argentina – Import Measures (Panel)*, paras. 6.257, 6.262-263, 265.

[111] Indonesia's First Written Submission, paras. 67-69, 134.

[112] *See* U.S. Response to Panel Question No. 12, paras. 60-61; U.S. First Written Submission, paras. 156-157 (for horticultural products) and 112, 269 (for animals and animal products); MOT 16/2013, as amended by MOT 47/2013, art. 14 (JE-10); *id.* art. 30; Ministry of Trade, Import Approval for Horticultural Products, June 30, 2014 (Exh. US-19); MOT 46/2013, as amended, art. 12 (JE-21); *id.* article 30(2); Ministry of Trade, Import Approval for Beef, Sept. 25, 2014 (Exh. US-43).

customs by the last day of the period, because goods that are shipped under an Import Approval for the previous period cannot be imported. For U.S. exporters, this results in a period of 4-6 weeks during which shipments cannot be made.[113]

75. Further, during this 4-6 week gap at the end of a validity period, importers cannot start shipping for the next period because Import Approvals have not yet been issued, and the customs formalities that, under Indonesia's regulations, must be completed in the country of origin *require* the relevant Import Approval number. Specifically, animal products imported into Indonesia are required to have a Certificate of Health, which must be completed *in their country of origin*.[114] This certificate can only be issued after the Registered Importer has received the Import Approval for those products because the Import Approval number must be included on the Certificate of Health.[115] And without a proper Certificate of Health, animal products cannot be imported. Similarly, horticultural products imported into Indonesia are required to undergo "verification and technical inquiry" *in their country of origin*. Importers cannot even apply for such verification without the Import Approval number under which they will be shipped, because the number is required to be included in the application.[116]

76. Thus, importers do not "choose," in any real sense of the word, to stop importing at the end of one validity period and the beginning of another, or to reduce their imports accordingly. Rather, that choice is *forced* on them by Indonesia's regulatory requirements. Consequently, the application window and validity periods for import permits are measures "maintained" by Indonesia and are within the scope of Article XI:1.

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[113] U.S. First Written Submission, para. 113; Meat Industry Letter, at 1 (Exh. US-44); NHC Statements, at pp. 3, 5 (Exh. US-21); "Shipping Times to Jakarta from Various U.S. Ports," https://www.searates.com/reference/portdistance/ (accessed Oct. 29, 2015) (Exh. US-49).

[114] MOT 46/2-13, as amended, art. 15(1) (JE-21) ("A Certificate of Health from the country of origin of the Animals and/or Animal Products that are to be imported must be issued after a RI-Animals and Animal Products have received Import Approval").

[115] MOT 46/2013, as amended, art. 15(2) (JE-21) ("The Import Approval Number must be included in the Certificate of Health, as described in paragraph (1)."); Import Approval for Beef, at 1 (Exh. US-43) ("The number and date of Import Approval for Fresh Animal Products must be written on the *Certificate of Health* issued by the product's country of origin.").

[116] MOT 16/2013, as amended by MOT 47/2013, art. 21, 22 (JE-10) ("Every shipment of imported horticultural products must undergo preshipment inspection at its port of origin, including verification of country of origin, product type and quantity, shipping timing, and port of destination."); Import Approval for Horticultural Products, para. 1 (Exh. US-19) ("Imports of the aforementioned Horticultural Products must undergo verification or technical inquiry in the country of origin by…in a manner that is in accordance with customs procedures."); KSO, SUCOFINDO, "Conditions for Verification of Import (VPTI) Commodity: Horticultural Products," at 1 (stating that importers must apply for verification by attaching, *inter alia*, their PI or RI designation "and Import Approval (SPI) for Horticultural Products").

b. Fixed License Terms

77. With respect to the fixed license terms measure, Indonesia errs in arguing that the trade-restrictiveness of this measure is the result of private choices and, therefore, is not a measure "instituted or maintained" by Indonesia.[117]

78. First, Indonesia's assertion that "[t]he terms of import licenses . . . are at the complete discretion of the importers themselves"[118] is itself incorrect, because a variety of restrictions imposed by Indonesia's import licensing regime severely curtail the ability of importers to freely determine the quantity, country of origin or other terms included in their applications for Recommendations or RIPHs and Import Approvals.[119] Indeed, Indonesia even acknowledges that the realization requirement, for example, is a "limitation[] on the terms identified by importers" in their import permit applications.[120]

79. Further, the measures the co-complainants are challenging are not the specific terms of any or each importer's license but, rather, the inability of importers, once an Import Approval validity period has begun, to respond to market conditions by importing products of a different type, quantity, country of origin, or port of entry than those specified on their import permits. This inability is the result of requirements maintained by Indonesia through its import licensing regulations.[121] Importers do not *choose* to be prohibited from amending the terms of their licenses, from applying for new licenses once a period has begun, or from importing products other than those specified on their permits. Indeed, Indonesia itself recognizes the restrictive effect of the fixed license terms requirement, stating in its First Written Submission that the evidence on the record suggests that "the 'dip' in shipments at the end of a validity period" is due to importers having met their "maximum import volume for the validity period."[122]

80. Thus, the inability of importers to import products other than those specified on their import permits for a given period, or to change the permits' terms or apply for new permits, is a

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[117] Indonesia's First Written Submission, para. 138.

[118] Indonesia's First Written Submission, paras. 74, 138.

[119] *See, e.g.*, U.S. First Written Submission, sections IV.B.3 and IV.D.4 (describing the realization requirement for importation of horticultural products and animals and animal products), IV.B.4 (describing the harvest period restrictions on importation of horticultural products), IV.B.5 (describing the restriction on horticultural product imports based on storage capacity), IV.B.6 and IV.D.5 (describing the use, sale, and transfer requirements for importation of horticultural products and animals and animal products),, IV.B.8 (describing the six-month requirement for importation of horticultural products), IV.D.1 (describing the prohibition on unlisted animals and animal products), and IV.D.6 (describing the domestic purchase requirement for importation of beef).

[120] Indonesia's Opening Statement, para. 21.

[121] *See* U.S. First Written Submission, paras. 162-163 (for horticultural products), 276-277 (for animals and animal products).

[122] Indonesia's First Written Submission, para. 71.

measure "maintained" by Indonesia and, as such, is subject to scrutiny under Article XI:1 of the GATT 1994.

c. Realization Requirements

81. Indonesia is also wrong that the realization requirement is not a restriction because it is "a function of importers' own estimates and because it can be changed by the importer at will from one validity period to the next."[123]

82. Under the realization requirement, importers must realize 80 percent of the quantity of products on their Import Approval or lose eligibility to import altogether.[124] The threat of becoming ineligible to apply for future permits incentivizes importers to be conservative in the types and quantities of products that they apply to import.[125] As a consequence of these under-estimates, overall importation during any import period would be reduced as compared to the amount importers might request to import under normal market conditions. Thus, importers do not "choose" to have their eligibility to import revoked if they fail to import a set percentage of the products listed on their Import Approvals and, therefore, they do not "choose" to underestimate the quantity for which they apply in order to avoid this sanction. Rather, importers' decisions to reduce the quantities for which they apply is a compelled response to Indonesia's realization requirement. This measure is therefore one maintained by Indonesia that falls within the scope of Article XI:1 of the GATT 1994.

d. Storage Capacity Requirements for Horticultural Products

83. Finally, Indonesia's claim that "[a]ny limitations placed on an importer's ability to import" caused by the storage capacity requirement for horticultural products "is self-imposed" also fails.[126]

84. Under this requirement, importers seeking to import horticultural products for sale (RIs) are allowed to apply to import only those quantities of products less than or equal to the storage capacity of the facilities that they own, on a 1:1 ratio for the full import period.[127] This means

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[123] Indonesia's First Written Submission, para. 107.

[124] *See* U.S. First Written Submission, paras. 170, 229, 284, 343.

[125] *See* ASEIBSSINDO Letter (Exh. US-28); NHC Statements, at 3, 5 (Exh. US-21).

[126] Indonesia's First Written Submission, para. 86.

[127] MOT 16/2013, arts. 8(1)(e) (stating that, to apply for an RI designation, and importer must submit "proof of ownership of storage facilities appropriate for the product's characteristics"), 8(3) (stating that an Assessment Team will "check the veracity of the documents and conduct a field inspection"), 8(5) ("stating that the UPP Coordinator "will reject the application for Confirmation as a RI-Horticultural Products" if the inspection "determine[s] that the submitted information is incorrect") (JE-10); MOA 86/2013, art. 8(2) (JE-15) (stating that RIPHs for fresh produce for consumption "must be accompanied with the following technical requirements: . . . (c) statement of ownership of storage and distribution facilities for horticultural products according to their characteristics and product type; (d) statement of suitability of storage capacity"); MOT 40/2015, art. I(2) (JE-40) (amending MOT 16/2013, article 13 to include a statement that "Issuance of an Import Approval . . . must take into

that importers are required to *own* (not lease) enough storage capacity to hold, at one time, all of the horticultural products that they will import for the entire six-month import period. Under normal market conditions, however, fresh fruit and vegetable inventories undergo multiple turnovers during a six-month semester, such that importers would fill, empty, and refill their storage facilities multiple times over the course of a single period.[128]

85. For example, if an importer could import and sell 10 tons of apples per month during a six-month semester, it would need only 10 tons of storage capacity to keep all its products fresh at all times. But Indonesia's storage ownership restriction requires this importer to own 60 tons of storage capacity to receive an Import Approval, even if the importer will never use more than a fraction of it at one time. Therefore, importers do not necessarily need access to such a large amount of storage capacity in order to properly store their inventory over a period of several months. And even if they were to need a certain amount of capacity, there is no need for importers to *own* storage capacity of any amount. Rather, commercial considerations might lead them to lease the amount of capacity needed at any particular time,[129] or even to forego storing the products themselves, selling instead directly to retailers or other consumers.

86. Thus, importers do not *choose* to limit the products they import to a fraction of what they could bring in under normal market conditions. Rather, their decision to self-restrict the quantity of imported products is a compelled response based on the requirements of Indonesia's storage capacity measure.

C. Indonesia's Arguments Concerning the Positive List for Animals and Animal Products Also Fails

87. The co-complainants have demonstrated that Indonesia only allows the importation of animals and animal products included in a "positive list", *i.e.*, those products listed in the appendices of MOT 46/2013 and MOA 139/2014.[130] Because unlisted animals and animal products are banned from importation, such a positive list is a measure inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture. Indonesia has failed to rebut the *prima facie* case established by the co-complainants.

88. Indonesia denies that it maintains a "positive list" in its First Written Submission.[131] Rather than addressing the co-complaints' claim based on the text of the regulations and other sources, however, Indonesia cites to trade data showing that live bovine animals classified under

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consideration the capacity and appropriateness . . . of the storage facilities and means of transportation owned by the RI-Horticultural Products."); ASEIBSSINDO Letter, at 1 (Exh. US-28).

[128] ASEIBSSINDO Letter (Exh. US-28).

[129] Importers applying to import horticultural products for products (PIs), for example, merely have to show "control" over appropriate storage facilities and thus are allowed to rent. *See* MOT 16/2013, art. 5(1)(e) (JE-10).

[130] U.S. First Written Submission, paras. 104–110, 258-262, 330-334; New Zealand First Written Submission, paras. 30-35, 38-45, 131, 309-312.

[131] Indonesia's First Written Submission, para. 96.

two HS Codes were imported into Indonesia in 2013 and 2014. Alleging that these two HS Codes are not listed on its version of MOT 46/2013, Indonesia presents their importation as evidence animals and animal products not listed in the appendices of MOT 46/2013 are not banned.[132] As discussed in the U.S. response to Panel question No. 47, however, the two tariff codes *are* included in MOT 46/2013 as presented in JE-18, which includes the original Bahasa version with an official signature page, [133] and is the version posted on the Ministry of Trade website.[134] It appears, therefore, that Indonesia has relied on an unofficial or outdated version of MOT 46/2013 in making this argument.

89. Further, Indonesia does not address the evidence presented by the co-complainants demonstrating the existence of the positive list. This evidence includes the text of MOT 46/2013 and MOA 139/2014, statements by Indonesian officials confirming that unlisted products are banned, independent accounts reporting that unlisted products are banned, and trade data showing the effect on imports when a product is removed from the list in Appendix I to MOA 139/2014.[135] Indonesia fails to address, let alone rebut, this evidence.[136]

90. Finally, in response to the Panel's request to clarify the legal instrument(s) under which unlisted products could otherwise be imported, Indonesia acknowledged that "certain beef offal products" are banned,[137] but maintained that other products are allowed "unless expressly prohibited by another instrument."[138] However, Indonesia did not point to any difference in the relevant regulations' treatment of unlisted beef offal products and other unlisted animals and animal products that would explain why *some* but not all unlisted products were banned. Further, Indonesia referenced only the Animal Law, MOA 139/2014, and amendments to MOT 46/2013 as regulations that apply to the (supposedly not banned) unlisted products.[139] These instruments make it clear, however, that animals and animal products *cannot be imported* without a Recommendation from the Ministry of Agriculture and an Import Approval from the Ministry of Trade,[140] and these permits cannot be obtained under MOT 46/2013 and MOA

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[132] Indonesia's First Written Submission, para. 98.

[133] U.S. Response to Panel Question No. 47, paras. 124-126; MOT 46/2013, as amended, p. 16-17 (JE-18).

[134] Ministry of Trade, "Regulations: Ketentuan Impor Dan Ekspor Hewan Dan Produk Hewan," http://jdih.kemendag.go.id/id/news/2013/09/30/ketentuan-impor-dan-ekspor-hewan-dan-produk-hewan, (accessed Feb. 14, 2016) (Exh. US-84).

[135] U.S. First Written Submission, paras. 104-110.

[136] Indonesia's First Written Submission, paras. 96-99.

[137] Indonesia's Response to Advance Panel Question No. 25, para. 25.

[138] Indonesia's Response to Advance Panel Question No. 21, para. 22.

[139] Indonesia's Response to Advance Panel Question No. 25, para. 25.

[140] Animal Law Amendment, art. 59(1) (JE-5) (providing that every person that imports animal products into Indonesia "must obtain import permit from the minister that organizes government affairs in trade sector after obtaining recommendation" from the Ministry of Agriculture); MOT 46/2013, as amended, arts. 4(1), 8, 9, 11 (JE-21), MOA 139/2014, as amended, art. 4 (JE-21).

139/2014 for unlisted animals and animal products. Thus, Indonesia has pointed to no regulation providing for the importation of such unlisted products.

91. Therefore, Indonesia has not rebutted the co-complainants' *prima facie* demonstration that animals and animal products not listed in the appendices of MOT 46/2013, as amended, *and* (for carcasses, meat, and offal) the appendices of MOA 139/2014, are prohibited from being imported into Indonesia.

III. INDONESIA'S IMPORT LICENSING REGIMES ARE INCONSISTENT WITH INDONESIA'S OBLIGATIONS UNDER ARTICLE 4.2 OF THE AGREEMENT ON AGRICULTURE

92. The United States has demonstrated that, for essentially the same reasons as discussed in the previous section concerning Article XI:1 of the GATT 1994, all of the challenged measures are inconsistent with Indonesia's obligations under Article 4.2 of the Agreement on Agriculture. As under Article XI:1, Indonesia does not contest the operation of the challenged measures (with the exception of the positive list for animals and animal products),[141] but advances incorrect legal arguments as to why, despite the restrictive effect the co-complainants have described, the measures are nevertheless not inconsistent with Article 4.2.

93. This section explains why Indonesia's legal arguments fail. Specifically, it explains that: (1) Indonesia's import licensing procedures are not automatic and, even if they were, would not be outside the scope of Article 4.2; (2) Indonesia's specific argument concerning the Reference Price requirements is legally incorrect and, in any case, does not suggest the requirements are not inconsistent with Article 4.2; and, (3) Indonesia's argument concerning the positive list fails for the same reasons it does under Article XI:1.

A. Indonesia's Argument that Its Import Licensing Regimes Are "Automatic" Is Based on an Incorrect Legal Premise and Is Factually Incorrect

94. Indonesia's argument that its import licensing regimes are "automatic" and, as such, are outside the scope of Article 4.2 of the Agreement on Agriculture is based on an incorrect legal premise and is factually inaccurate.

95. First, as set out in the U.S. responses to the Panel's questions, Indonesia's assertion that "automatic" import licensing regimes are outside the scope of Article 4.2 is legally incorrect.[142] By its text, Article 4.2 covers "any measures of the kind which have been required to be converted into ordinary customs duties." The only measures that are *excluded* from Article 4.2 are "ordinary customs duties"; all other types of measures are potentially covered. The Appellate Body confirmed the broad scope of Article 4.2 in *Chile – Price Band System*, stating that Article 4.2 was the "legal vehicle" for the conversion of all "market access barriers" into

[141] *See, e.g.*, Indonesia's Response to Panel Question No. 10, para. 4.

[142] *See* U.S. Response to Panel Question 11, paras. 43-45.

ordinary customs duties.[143] All "market access barriers" would not exclude automatic import licensing regimes to the extent they are border measures "similar" to those listed in footnote 1.

96. Further, the text of Article XI:1 of the GATT 1994 is explicit that "import or export licenses" *can* impose restrictions on importation within the meaning of Article XI:1. Previous panels have found that "restrictions" under Article XI:1 are also inconsistent with Article 4.2 of the Agreement on Agriculture.[144] These findings further support the interpretation that import licensing regimes are potentially within the scope of Article 4.2. Thus, a label such as "automatic" would not suffice to exclude, *per se*, Indonesia's import regimes from the ambit of these provisions. The panel would still need to assess the content of the challenged measures in order to make an objective assessment of their WTO-consistency.

97. Additionally, as a factual matter, Indonesia's import licensing regimes are not "automatic." As described in the U.S. response to Panel question 11, Indonesia's argument is based on an incorrect definition of "automatic" that, if accepted, would mean Members could impose, through import licensing, *any* substantive restriction on importation, as long as import licensing agents could not exercise discretion in issuing licenses and licenses eventually were granted after all legal requirements were met.[145] Even if a regime's automaticity could affect its consistency under Article XI:1 or 4.2, the definition of "automatic" proposed by Indonesia has no support in the text of any of the covered agreements. Further, the suggestion that licensing regimes such as Indonesia's are immune from scrutiny would undermine the prohibitions of Articles XI:1 and 4.2, because it would allow Members to impose substantive restrictions on importation – including restrictions on who can import, the type and quantity of products that can be imported, and the times during which importation can occur – under the guise of legitimate licensing procedures.

98. Indonesia's own import licensing regime illustrates the error of its proposed definition. Under Indonesia's import licensing regime, importers may not, ever, receive permission to import certain products. Additionally, importers may not import other products if the government determines that imports would compete with the domestic harvest, or if the Indonesian market price of certain products is below a government-determined level. Further, importers must specify in advance precisely the products they will import over the next three- or six-month period, may import only those products, and will be penalized if they do not import at least 80 percent of those products. Additionally, animal products may not be imported for general retail sale, and horticultural products must be sold only to distributors. Even if all import

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[143] *Chile – Price Band System (AB)*, paras. 200-201.

[144] *See Korea – Beef (Panel)*, para. 762; *Chile – Price Band System (Panel)*, para. 7.30 ("In our view, the scope of footnote 1 to the Agreement on Agriculture certainly extends to measures within the scope of Article XI:1 of GATT 1994, but also extends to other measures than merely quantitative restrictions."); *India – Quantitative Restrictions (Panel)*, paras. 5.241-242.

[145] U.S. Response to Panel Question 11, paras. 47-49.

permit applications that met these legal requirements *were* granted, these importation procedures are in no sense "automatic."

99. Thus, Indonesia's claims concerning the approval rate of applications for import permits do not suggest that its import licensing regimes are "automatic." For example, Indonesia asserts that "no applications *that fulfilled all legal requirements*" were rejected between 2013 and 2015.[146] In support of this statement, Indonesia presents a chart purporting to show RIPH/Recommendations and Import Approvals applied for and issued since 2013.[147] Even if accurate, these figures do not suggest that Indonesia's import licensing regime is automatic because they ignore the substantive restrictions imposed through the "legal requirements" to obtain a permit. If, as in this case, these "legal requirements" restrict the type, quantity, and time period of importation, the fact that all applications that meet these requirements are accepted is irrelevant to whether the import licensing regimes in question are "automatic" or "a form of border protection."

100. It is doubtful, however, that Indonesia's figures are accurate. First, the source of the data is not specified.[148] Second, bulletins issued by the Ministry of Agriculture contradict the information presented by Indonesia, showing that, for 2013-2014, 17.3 percent of all RIPH applications were rejected.[149] Further, the Ministry of Agriculture bulletin illustrates how, even if Indonesia's numbers were correct, the regime would not be "automatic." That is, the bulletin explains that, for the first semester of 2013, there were applications for only 8 products[150] because, due to the domestic harvest restrictions, those were the only products for which applications were accepted.[151] In short, whether accurate or not, Indonesia's statistics do not

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[146] Indonesia's First Written Submission, para. 63

[147] Indonesia's Response to Panel Question No. 8.

[148] Indonesia's Response to Panel Question No. 8.

[149] Ministry of Agriculture, "Summary of Fresh Product RIPHs Applied for and Issued, 2013-2014," http://eksim.pertanian.go.id/tinymcpuk/gambar/file/data_rekomendasi_eksim.pdf (Exh. US-96); *see also* Ministry of Agriculture, "Horticultural Product Import Recommendation (RIPH)," Apr. 2013, http://eksim.pertanian.go.id/tinymcpuk/gambar/file/RIPH_APRIL_2013.pdf (accessed Feb. 29, 2016) (Exh. US-97); Ministry of Agriculture, "Horticultural Product Import Recommendation (RIPH) Developments," Feb. 2013, http://eksim.pertanian.go.id/tinymcpuk/gambar/file/RIPH_FEB_2013.pdf (accessed Feb. 29, 2016) (Exh. US-98). Other sources contradict Indonesia's figures on approval rates for imports of animals and animal products. *See* Thomas Wright, U.S. Dep't of Agriculture, Foreign Agricultural Serv., *GAIN Report ID1527: Beef and Horticultural Import License Update*, July 27, 2015 (Exh. US-40) (stating that, for the second semester of 2015, importers reported that 108 Import Approvals for animals and animal products were issued out of 140 applications).

[150] Ministry of Agriculture, "Summary of Fresh Product RIPHs Applied for and Issued, 2013-2014," (Exh. US-96).

[151] Ministry of Agriculture, "Horticultural Product Import Recommendation (RIPH)," Apr. 2013 (Exh. US-97) (explaining that "Fresh Horticultural Product RIPH applications for the period of January-June 2013 were received from January 17-25, 2013. In this period, the commodities accepted was limited to only 8 types: apples, grapes, citrus [fruits], longans, garlic, shallots, onions, and Atlantic potatoes").

suggest that its import licensing regimes are either automatic or are otherwise not inconsistent with Article 4.2.

B. Indonesia's Argument Concerning the Reference Price Requirements Does Not Suggest that They Are Not Inconsistent with Article 4.2

101. Indonesia asserts that the Reference Price requirements for chili and shallots[152] are not "minimum import price[s]," within the meaning of Article 4.2 because they do not have certain "essential attributes," namely an "additional duty" levied on "individual imports" to prevent their entry below a set price and the feature of "imped[ing] the transmission of world prices to the domestic market."[153] This argument is based on an incorrect legal premise and is factually incorrect. Moreover, Indonesia has not demonstrated that the Reference Price is not also a "quantitative import restriction" or other "similar border measure."

102. As described in the U.S. response to Panel questions, Indonesia's assertion that a measure *cannot* be a "minimum import price" or "similar border measure" if it does not include an additional duty levied on individual imports is based on an incorrect legal interpretation.[154] Neither the text of Article 4.2 nor relevant Appellate Body reports support this interpretation. The ordinary meaning of the term "minimum import price" suggests that any measure that sets the "lowest possible" price for imports would be covered, and the Appellate Body has found that the term "refers generally to the lowest price at which imports of a certain product may enter a Member's domestic market."[155] Indeed, the Appellate Body has found that, although minimum import price schemes may "generally" operate in relation to the transaction value of individual imports and involve the imposition of an additional charge, measures that operate differently "could nevertheless qualify as a 'minimum import price' scheme or as a 'similar border measure.'"[156] Thus, a fact-specific assessment must be made of the design, structure and operation of the challenged measure.

103. As set out in the U.S. Response to Panel question 39, the Reference Price requirements clearly fall within the definition of a "minimum import price," because they prohibit all importation when prices are below a set level.[157] In this way, Indonesia's reference price operates in a more trade-restrictive and categorical way than a transaction-based minimum

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[152] Indonesia has not put forward any arguments concerning the co-complainants' claim under Article 4.2 against the Reference Price requirement for beef products. However, Indonesia has asserted that it is contesting this requirement. *See* Indonesia's Response to Panel Question 65, para. 41. Although Indonesia has not provided specifics of what its argument is in this regard, the U.S. arguments set out in this section would apply equally to the Reference Price for beef products.

[153] Indonesia's First Written Submission, paras. 93-94.

[154] *See* U.S. Response to Panel Question No. 39, paras. 105-110..

[155] *Chile – Price Band System (AB)*, para. 236; *Peru – Agricultural Products (AB)*, para. 5.128; *see Chile – Price Band System (Article 21.5 – Argentina) (AB)*, para. 152.

[156] *Peru – Agricultural Products (AB)*, para. 5.129.

[157] U.S. Response to Panel Question No. 39, para. 109.

import price, because no imports, even those priced above the reference price, will be allowed entry while the domestic market price remains below the reference price. Indonesia's measure thus sets the "lowest possible" price for imports into Indonesia and is therefore a "minimum import price" within the meaning of Article 4.2.

104. Indonesia is also incorrect that impeding the transmission of world prices is an "essential element" of a minimum import price scheme that must be separately demonstrated. Again, neither the text of the provision nor relevant Appellate Body reports support this as being a necessary element of a "minimum import price."[158] Indeed, the Appellate Body in *Peru – Agricultural Products* stated explicitly that impedance of world prices is not an "independent or absolute characteristics that a measure must display" in order to be inconsistent with Article 4.2.

105. While not a necessary element in terms of the legal standard under Article 4.2, we note that Indonesia's Reference Price does, in fact, have the effect of entirely cutting off imports if the market price of the covered products falls below the relevant Reference Price, thereby insulating the Indonesian market from downward pressure on prices. That is, the Reference Price sets a floor below which international prices cannot be transmitted to the Indonesian market.

106. Moreover, even if Indonesia were correct that the Reference Price is not a minimum import price, the Reference Price still would breach Article 4.2. Article 4.2 covers all "measures of the kind which have been required to be converted into ordinary customs duties," not only "minimum import prices." Previous panels and the Appellate Body have confirmed that measures can fall into more than one category of measures listed in Footnote 1 to Article 4.2.[159] Indonesia's Reference Price requirements also are inconsistent with Article 4.2 because they are "quantitative import restrictions" or "similar border measures."[160] Specifically, Indonesia's requirements limit the importation of covered products to periods when the market prices of chilies or shallots are above the pre-determined level, and prohibit importation of covered products when this is not the case. Thus, the requirements constitute an import prohibition when prices fall below the Reference Price. And even when the Reference Price has not been triggered, the measure also constitutes an import restriction because the threat of such a prohibition reduces the incentives for importation.[161]

107. Thus, Indonesia has not rebutted the *prima facie* case that the Reference Price requirements are a "minimum import price," "quantitative import restriction" or "similar border measure," under Article 4.2 of the Agreement on Agriculture.

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[158] U.S. Response to Panel Question No. 61, paras. 154-155.

[159] *See Chile – Price Band System (AB)*, para. 262; *Turkey – Rice*, paras. 7.121, 7.134.

[160] *See* U.S. Response to Panel Question No. 39, para. 110.

[161] U.S. First Written Submission, paras. 314-315.

C. Indonesia's Other Arguments under Article 4.2 Fail for the Same Reasons They Fail under Article XI:1

108. Indonesia's other arguments under Article 4.2 of the Agreement on Agriculture are essentially the same as its arguments under Article XI:1 of the GATT 1994 and, therefore, fail for the same reasons.

109. First, like Article XI:1, Article 4.2 does not require the co-complainants to demonstrate quantitatively that a measure has adversely impacted the overall volume of imports. As under Article XI:1, Indonesia argues the co-complainants have not established a *prima facie* case because they have not proven that certain measures – the application windows and validity periods,[162] the realization requirement for horticultural products,[163] the domestic harvest period restrictions,[164] the storage capacity requirements,[165] the six-month requirement,[166] the use restrictions,[167] the domestic purchase requirement,[168] and the horticultural products regime as a whole[169] – have had a negative effect on import volumes.

110. However, as under Article XI:1, neither the text nor previous interpretations of Article 4.2 support Indonesia's argument that a demonstration of trade effects is required.[170] The text does not refer to trade effects, and the Appellate Body and previous panels have found that analysis of a measure under Article 4.2 should focus on the measure's "design, structure, and operation," with trade data serving only as supplementary evidence.[171] In particular, the panel in *Turkey – Rice* found that, "[e]ven without any systematic intention to restrict the importation of rice at a certain level," denial or refusal to grant permits to import rice outside of quota during certain periods was a "quantitative import restriction" under Article 4.2 because it was "liable to restrict the volume of imports."[172] In any event, although a showing of trade impacts is not necessary to demonstrate a breach, the co-complainants have, in fact, demonstrated that all the

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[162] Indonesia's First Written Submission, para. 69-71, 102.

[163] Indonesia's First Written Submission, para. 80. Indonesia did not appear to make this argument with respect to the realization requirement for beef products. *See id.* para. 107.

[164] Indonesia's First Written Submission, para. 82.

[165] Indonesia's First Written Submission, para. 84.

[166] Indonesia's First Written Submission, para. 89.

[167] Indonesia's First Written Submission, paras. 90 (for horticultural products), 110 (for animal products).

[168] Indonesia's First Written Submission, para. 112.

[169] Indonesia's First Written Submission, para. 95. Indonesia did not appear to make this argument with respect to the animals and animal products regime as a whole.

[170] *See* U.S. Response to Panel Question No. 13, para. 69.

[171] *See Peru – Agricultural Products (AB)*, para. 5.147, n.373.

[172] *Turkey – Rice*, paras. 7.120-121.

measures with respect to which Indonesia asserted this defense have had an adverse impact on trade volumes, as described in Section II.A.2 above.[173]

111. Second, and again like Article XI:I, Article 4.2 does not exclude from its scope measures that operate by compelling private actors to make trade-restrictive choices. Indonesia advances this argument with respect to the application windows and validity periods,[174] the fixed license terms requirements,[175] the realization requirements,[176] and the storage capacity requirement.[177]

112. As described in the U.S. response to Panel questions, however, neither the text of Article 4.2 nor previous interpretations support this argument.[178] The scope of Article 4.2 extends to "any measures of the kind which have been required to be converted into ordinary customs duties," and the Appellate Body has recognized that it was intended to be the "legal vehicle" for the conversion of all forms of border protection into ordinary customs duties.[179] The text does not suggest, therefore, that measures that require some private action would be excluded from the scope. Further, previous panels and the Appellate Body have found that Article XI:1 covers measures that effect a "restriction" (or "limiting effect") on importation by compelling private actors to make trade-restrictive choices.[180] Because measures that breach Article XI:1 necessarily also breach Article 4.2,[181] these panel and Appellate Body findings provide further support for the proposition that measures which compel private actors to make non-commercial choices in order to import are covered by the prohibition under Article 4.2.

113. Finally, Indonesia's factual argument concerning the positive list for animals and animal products fails for the same reasons as the same argument fails under Article XI:1.[182]

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[173] *See supra* sec. II.A.2.

[174] Indonesia's First Written Submission, paras. 67-69, 101-103.

[175] Indonesia's First Written Submission, paras. 74, 105-106; Indonesia's Opening Statement, para. 21.

[176] Indonesia's First Written Submission, paras. 107; Indonesia's Opening Statement, para. 22.

[177] Indonesia's First Written Submission, para. 86.

[178] U.S. Response to Panel Question No. 62, paras. 162-164.

[179] *Chile – Price Band System (AB)*, paras. 200-201.

[180] *See supra* sec. II.B.1; *India – Autos*, para. 7.268; *Argentina – Import Measures (Panel)*, paras. 6.260-261; *see also Korea – Various Measures on Beef (AB)*, para. 146 (articulating this principle in the context of Article III:4 of the GATT 1994).

[181] *Korea – Beef (Panel)*, para. 762; *Chile – Price Band System (Panel)*, para. 7.30 ("In our view, the scope of footnote 1 to the Agreement on Agriculture certainly extends to measures within the scope of Article XI:1 of GATT 1994, but also extends to other measures than merely quantitative restrictions."); *India – Quantitative Restrictions (Panel)*, paras. 5.241-242.

[182] *See supra* sec. II.C.

114. Thus, Indonesia has not rebutted the *prima facie* case made by the United States in its first written submission that each of the challenged measures is inconsistent with Article 4.2 of the Agreement on Agriculture.

IV. INDONESIA HAS FAILED TO ESTABLISH A DEFENSE UNDER ARTICLE XX OF THE GATT 1994 WITH RESPECT TO ANY OF THE CHALLENGED MEASURES

115. As described above and in co-complainants' prior submissions, each of the challenged measures is inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture. In this section we will discuss why, additionally, none of the challenged measures at issue in this dispute are justified under Article XX of the GATT 1994. Part A of this section sets out the legal standard of Article XX and the relevant subparagraphs. Part B, C, and D, demonstrate that Indonesia has not shown that any of the challenged measures meet the standard for preliminary justification under subparagraphs (d), (b), or (a) of Article XX, respectively. Part E then explains that, even if Indonesia had made such a showing, all of the challenged measures are nevertheless applied inconsistently with the chapeau of Article XX.

A. The Legal Standard of Article XX

116. Article XX of the GATT 1994 provides:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> (a) necessary to protect public morals;
>
> (b) necessary to protect human, animal, or plant life or health; . . . [or]
>
> (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement. . . .

117. Thus Article XX sets out the circumstances in which measures that have been found to be inconsistent with another provision of the GATT 1994 will nevertheless be justified and therefore not be found inconsistent with a Member's WTO obligations. Additionally, for purposes of this dispute, if any of the challenged measures is found to be justified under Article XX, and thus not in breach of Indonesia's obligations under the GATT 1994, that measure would be "maintained under" a "general, non-agriculture-specific provision[] of the GATT 1994" and, as such, would fall outside the scope of Article 4.2 of the Agreement on Agriculture.[183]

[183] As the United States explained in its response to questions from the Panel, in this dispute, because each the measures at issue in this dispute has been challenged under both Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture, the Panel can resolve all of the claims by addressing the co-complainants' claims

118. To establish that a measure is justified under Article XX, the responding Member asserting the defense must show that the measure at issue is: (1) provisionally justified under one of the Article XX subparagraphs; and, (2) applied consistently with the requirements of the chapeau.[184] Indonesia has asserted defenses of challenged measures under subparagraphs (a), (b), and (d) of Article XX (sometimes multiple defenses of a single measures). These subparagraphs each incorporate two elements, namely: (1) the challenged measure must be adopted or enforced to pursue the objective covered by the subparagraph; and (2) the measure must be "necessary" to the achievement of that objective.[185]

119. With respect to the first element, the Appellate Body stated in *EC – Seal Products* that a panel "should take into account the Member's articulation of the objective or the objectives it pursues through its measures, but it is not bound by that Member's characterization of such objective(s)."[186] Rather, a panel should make an objective determination of the objective(s) of a measure based on the evidence before it, including the "texts of statutes, legislative history, and other evidence regarding the structure and operation of the measure at issue."[187]

120. With respect to the second element, the "necessity test", Indonesia first must show that the measure makes a contribution to its covered objective, meaning that there exists "a genuine relationship of ends and means between the objective pursued and the measure at issue."[188] Indonesia must also show that the contribution is such that the measure may be considered "necessary."[189] In terms of the level of contribution required, the Appellate Body has recognized that a "necessary" measure is "significantly closer to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution to' [its objective]."[190] As part of this analysis, a panel should analyze the "trade-restrictiveness of the measure," balanced against the measure's

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under Articles XI:1 and Indonesia's defenses under XX of the GATT 1994 first, and therefore without interpreting, in the abstract, the relationship between Article 4.2 of the Agriculture Agreement and Article XX of the GATT 1994. *See* U.S. Response to Panel Questions No. 72, 74; *see also* Brazil's Response to Question No. 7 to the Third Parties; European Union's Response to Question No. 7 to the Third Parties; Japan's Response to Question No. 7 to the Third Parties, paras. 20-21.

[184] *EC – Seal Products (AB)*, para. 5.297; *US – Gasoline (AB)*, pp. 22-23; *US – Gambling (AB)*, para. 282; *Korea – Various Measures on Beef (AB)*, para. 157.

[185] *EC – Seal Products (AB)*, para. 5.169; *Brazil – Retreaded Tyres (AB)*, paras. 144-145; *Korea – Beef (AB)*, para. 157.

[186] *EC – Seal Products (AB)*, para. 5.144.

[187] *EC – Seal Products (AB)*, para. 5.144.

[188] *Brazil – Retreaded Tyres (AB)*, para. 210; *EC – Seal Products (AB)*, para. 5.180 (citing *EC – Seal Products (Panel)*, para. 7.633).

[189] *Korea – Various Measures on Beef (AB)*, para. 161 (finding this level of contribution is, on a continuum between "making a contribution to" and "indispensable," "located significantly close to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution to.'"); *Brazil – Retreaded Tyres (AB)*, para. 141.

[190] *See Korea – Various Measures on Beef (AB)*, para. 161; *Brazil – Retreaded Tyres (AB)*, para. 141.

contribution to its objective.[191] The more trade-restrictive a measure is, the greater should be its contribution to the covered objective for the measure to be considered "necessary."[192] In conducting an analysis of whether a challenged measure is "necessary" to the achievement of its covered objective, a panel may also consider any less trade-restrictive alternative measures proposed by the complaining Member.[193]

121. If Indonesia made this showing with respect to any of the challenged measures, Indonesia then would have to show that the measure was applied consistently with the chapeau. The chapeau exists "to prevent the abuse or misuse of a Member's right to invoke the exceptions contained in the [Article XX] subparagraphs."[194] As such, the party invoking Article XX has the burden of showing that a measure is applied consistently with the chapeau.[195] Thus, Indonesia would have to demonstrate that any measure justified under an Article XX subparagraph does not discriminate "between countries where the same conditions prevail," including between Indonesia and other Members, or that such discrimination is not "arbitrary or unjustifiable."[196] Indonesia must also show that the measure is not a disguised restriction on trade. Whether a measure is applied consistently with the chapeau is an objective determination based on the "design, the architecture, and the revealing structure of a measure."[197]

B. None of the Challenged Measures Is "Necessary To Secure Compliance with" Any Indonesian Law or Regulation, as Required by Article XX(d)

122. Indonesia asserts defenses under Article XX(d) with respect to the co-complainants' claims against: (1) the application windows and validity periods, (2) the fixed license terms, and (3) the realization requirements for both horticultural products and animals and animal products, as well as (4) the storage capacity and (5) the use, sale, and transfer restrictions on horticultural products, and, (6) both import licensing regimes as a whole.[198]

123. To establish that one of these measures is preliminarily justified under Article XX(d), Indonesia must establish two elements: (1) that the measure is "designed to 'secure compliance' with laws or regulations that are not themselves inconsistent with some provision of the GATT

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[191] *EC – Seal Products (AB)*, para. 5.169; *Korea – Various Measures on Beef (AB)*, para. 163.

[192] *Korea – Various Measures on Beef (AB)*, para. 162.

[193] *Brazil – Retreaded Tyres (AB)*, para. 156.

[194] *EC – Seal Products (AB)*, para. 5.297.

[195] *EC – Seal Products (AB)*, para. 5.297.

[196] *EC – Seal Products (AB)*, paras. 5.301, 5.304, 5.306.

[197] *EC – Seal Products (AB)*, para. 5.302.

[198] *See* Indonesia's First Written Submission, paras. 136, 140,142-145, 149, 160, 163. To the extent that Indonesia is asserting an Article XX(d) defense with respect to the application windows and validity period requirements, fixed license terms, and realization requirements imposed on the importation of animal products, that defense is entirely derivative of Indonesia's defense of the analogous requirements for horticultural products. *See* Indonesia's First Written Submission, para. 163. Consequently, we address both defenses together in this section.

1994"; and, (2) that the measure is "necessary to secure such compliance."[199] Indonesia has satisfied neither element with respect to any of its defenses under Article XX(d).

1. Indonesia Has Not Identified Any WTO-Consistent Laws or Regulations with Which Its Various Import Restrictions Are Necessary To Secure Compliance

124. Indonesia has not satisfied the first element of Article XX(d) for any of the challenged measures, because Indonesia has not identified any law or regulation not inconsistent with the GATT 1994 with which any of the challenged measures is necessary to secure compliance.[200]

125. For the application windows and validity periods, the fixed license terms, the realization requirements, and the storage capacity restrictions, Indonesia asserts the measures are necessary for "customs enforcement."[201] For the use, sale, and transfer restrictions on horticultural products, Indonesia states that the measure is "necessary . . . to secure compliance with Indonesia's food safety requirements."[202] In its first written submission and statements at the Panel hearing, Indonesia mentioned *no* relevant legal instruments with which these measures were supposedly "necessary to secure compliance."

126. Subsequently, in response to a Panel question, Indonesia named three legal instruments, as well as ten "other relevant regulations" referred to in a response to a previous question as being *among* the "WTO-consistent laws and regulations" with which these measures are "designed to secure compliance."[203] However, Indonesia did not submit the relevant laws or regulations for the record, did not specify what aspects of these laws were relevant to the Panel's analysis, and provided no explanation as to why any of the challenged measures were necessary to secure compliance with these laws. Thus, Indonesia's most specific reference to a WTO-consistent rule with which the various challenged measures are purportedly necessary to secure compliance consists of a non-exhaustive list of thirteen laws and regulations covering numerous distinct topics including customs generally, import quarantine, labeling, food safety, recycling, and verification or technical surveillance in the trading sector.[204]

127. The findings of previous Appellate Body and panel reports make clear that Indonesia has not identified sufficiently the legal rule(s) with which the measures are necessary "to secure compliance," as required by Article XX(d). The Appellate Body in *Mexico – Taxes on Soft Drinks* considered the term "laws and regulations," as used in Article XX(d), and found that it

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[199] *Korea – Beef (AB)*, para. 157.

[200] *See* Indonesia's First Written Submission, paras. 136, 140,142-145, 149, 160, 163.

[201] *See* Indonesia's First Written Submission, paras. 136, 140,142-145, 149, 163;

[202] Indonesia's First Written Submission, para. 160.

[203] Indonesia's Response to Panel Question No. 71, paras. 45-47.

[204] Indonesia's Response to Panel Question No. 71, para. 47; Indonesia's Response to Panel Question No. 20, para. 12.

referred to "*rules* that form part of the domestic legal system of a WTO Member."[205] In *Thailand – Cigarettes (Philippines)*, the Appellate Body found that Thailand's Article XX(d) defense failed because "Thailand failed to identify precisely the 'laws or regulations' with which the measure at issue purportedly secures compliance."[206] Thailand had referred generally to "Thailand's [value-added tax] law," "Chapter 4 of Thailand's Revenue Code," and "reporting requirements of its VAT and other tax laws."[207] The Appellate Body found that these references were insufficient for purposes of identifying a WTO-consistent rule under Article XX(d), noting that they "encompass a myriad of provisions of Thai law addressing various matters."[208]

128. Previous panel reports also confirm that Indonesia's general references to "customs enforcement," "health laws," and entire pieces of legislation do not satisfy Article XX(d). The panel in *Colombia – Ports of Entry* found that Colombia's general references to "laws and regulations relating to customs enforcement" were not sufficient for purposes of the first element Article XX(d).[209] Only after Colombia had cited relevant legal provisions and submitted the text into evidence did the panel consider that it had had adequately identified the relevant laws and regulations.[210] Similarly, in *Colombia – Textiles*, Colombia referred generally to "legislation against money laundering," and named two articles of its Criminal Code as "laws or regulations" under Article XX(d).[211] The panel found that Colombia had not identified sufficiently one of the articles, explaining: "Colombia has not reproduced its text in any of its submissions or statements, nor has it presented any exhibit containing the text. In other words, the content of [the article] is not on the record."[212] Similarly, Indonesia has not sufficiently identified or submitted into evidence any relevant provisions of Indonesian law with respect to any of its Article XX(d) defenses.

129. Additionally, Indonesia has made no assertions concerning the WTO-consistency of the relevant laws and regulations. This is not surprising: because Indonesia has not identified any relevant rule of its domestic legal system, it would be impossible to articulate how that rule is WTO-consistent (or inconsistent). Thus all of Indonesia's defenses under Article XX(d) must fail because Indonesia has not even met the preliminary requirement of identifying the relevant WTO-consistent laws and regulations with which the challenged measures are "necessary to secure compliance."

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[205] *Mexico – Taxes on Soft Drinks (AB)*, para. 69 (emphasis added).

[206] *Thailand – Cigarettes (Philippines) (AB)*, para. 179.

[207] *Thailand – Cigarettes (Philippines) (AB)*, para. 179, n.271.

[208] *Thailand – Cigarettes (Philippines) (AB)*, n.271.

[209] *Colombia – Ports of Entry*, paras. 7.516-517.

[210] *Colombia – Ports of Entry*, paras. 7.516-517, 7.521.

[211] *Colombia – Textiles (Panel)*, para. 7.505.

[212] *Colombia – Textiles (Panel)*, para. 7.507. These findings are on appeal and have not been adopted.

2. The Challenged Measures Are Not Designed to Secure Compliance with Customs Enforcement

130. As described above, all but one of Indonesia's Article XX(d) defenses are based on the challenged measure being "necessary" to "customs enforcement." In the preceding section, the United States explained why Indonesia has not sufficiently identified any WTO-consistent law or regulation with which any of the challenged measures is necessary to secure compliance. However, even if Indonesia were to identify with the necessary specificity a WTO-consistent law or regulation relating to customs enforcement, based on a review of the challenged measures themselves, none of the measures is designed to secure compliance with customs rules.

131. Indonesia asserts that the application windows and validity periods, the fixed license terms, the realization requirements, and the storage capacity requirement for horticultural products are related to customs enforcement, but Indonesia points to no evidence that this is, in fact, the case.[213] The Appellate Body has found that mere assertions concerning the purpose of the challenged measure are not sufficient to establish that a measure is maintained under an Article XX subparagraph.[214] Rather, the Panel should look to the text, structure, and history of the challenged measure to determine whether the stated objective is, in fact, the objective of the measure.[215]

132. Nothing in any of the challenged measures suggests a connection between Indonesia's import licensing restrictions and customs enforcement. First, none of the regulations establishing the various restrictions mentions customs enforcement as one of its purposes.[216] Further, the import licensing regimes are administered by the Ministries of Trade and Agriculture and are distinct from Indonesia's customs regime, which is administered by the Finance Ministry. MOT 16/2013, as amended, states explicitly that the pre-shipment verification of horticultural products "does not reduce the authority of the Directorate General of Customs and Excise of the Finance Ministry for conducting customs inspections."[217] Confirming the lack of connection to customs enforcement, when Indonesia notified to the WTO Import Licensing Committee the regulations

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[213] *See* Indonesia's First Written Submission, paras. 136, 140,142-145, 149, 163.

[214] *EC – Seal Products (AB)*, para. 5.144 (stating that panels "should take into account the Member's articulation of the objective or the objectives it pursues through its measures, but it is not bound by that Member's characterization of such objective(s)").

[215] *EC – Seal Products (AB)*, para. 5.144.

[216] MOT 16/2013, as amended by MOT 47/2013, p. 1 (JE-10) (stating the purpose as "to protect consumers, promote business certainty and transparency, and simplify the licensing process and the administration of imports"); MOA 86/2013, p. 1 (JE-15) (stating the purpose as "to simplify the import process . . . and provid[e] certainty in servicing Import Recommendation[s]"); MOT 46/2013, as amended, p. 1 (JE-21) (stating the purpose as "to improve consumer protection, preserve natural resources, provide business certainty, transparency, and simplify the licensing process and the administration of imports"); MOA 139/2014, as amended, p. 1 (JE-28) (stating the purpose as "to optimize the importation services of carcasses, meat, and/or their processed products").

[217] MOT 16/2013, as amended by MOT 47/2013, art. 23 (JE-10).

setting out its regimes covering the importation of horticultural products and animals and animal products, Indonesia did not list customs enforcement as a purpose of either regime.[218]

133. Additionally, as described in the U.S. First Written Submission, it is clear from the text, structure, and history of the import licensing regulations and the framework legislation pursuant to which both import licensing regimes were established that their actual purpose is to protect domestic producers from competition from imports. The Horticulture Law states that the Indonesia government must maintain the balance of horticultural supply and demand by "controlling import and export" of horticultural products, and must "give priority to the selling of local horticultural products."[219] Similarly, the Animal Law states that importation of animals and animal products should be done only "if local production and supply of animals or cattle and animal products is not sufficient to fulfill consumption needs of the society."[220] The import licensing regulations were promulgated pursuant to these statutes,[221] and Indonesian officials have confirmed that the purpose of the regimes is to restrict food imports in order to achieve self-sufficiency in food production.[222]

134. Thus, Indonesia has presented no evidence that the challenged measures are designed to promote customs enforcement. Instead, a review of the challenged measures demonstrates that the actual purpose of the import licensing regimes is to protect domestic producers and achieve self-sufficiency in food production, and is unrelated to customs enforcement.

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[218] *See* Notification to the Committee on Import Licensing under Article 5.1-5.4 of the Import Licensing Agreement, G/LIC/N/2/IDN/14, June 26, 2013 (Exh. US-54) (specifying no administrative purpose for MOT 16/2013); Notification to the Committee on Import Licensing under Article 5.1-5.4 of the Import Licensing Agreement, G/LIC/N/2/IDN/19, Feb. 4, 2014 (Exh. US-55) (specifying the administrative purpose of MOT 46/2013 as "to establish healthy trade, conducive business environment and orderly import and administration").

[219] Horticulture Law, art. 90. 92(1) (JE-1).

[220] Animal Law, art. 36(4) (JE-4).

[221] *See* MOA 86/2013, Preamble (4) (JE-15) (referring to the Horticulture Law); MOT 16/2013, as amended by MOT 47/2013, Preamble (5) (same); MOA 139/2014, Preamble (b), (5) (JE-28) (referring to the Animal Law); MOT 46/2013, as amended, Preamble (9) (JE-21) (same).

[222] U.S. First Written Submission, paras. 16, 84-85; Chief Economic Minister Defends Ban on Horticultural Import," *Antaranews*, Feb. 7, 2013 (Exh. US-13) (quoting the Coordinating Minister for Economic Affair, Hatta Rajasa, defending seasonal restrictions on horticultural products in 2013 by explaining that the ban was designed to protect local producers, and that imports were not necessary because, during the harvest season, domestic supply is sufficient to satisfy demand); Waris Gusmiati, "Ministry of Agriculture: Horticulture Imports Not Prohibited but Regulated," *Berita 2 Bahasa*, Mar. 2, 2013 (Exh. US-14) (quoting Minister of Agriculture Ir. H. Suswono explaining that "the principle of import . . . [is] only to fill the need that is not available in the country"); "Meat Imports Tightened," *AgroFarm*, Mar. 12, 2012 (Exh. US-11) (quoting the Ministry of Agriculture explaining that the ministry would use Indonesia's import licensing regulations to reduce meat imports by setting a quota for the year and then issuing permits only for that amount and that the ministry would decrease Indonesia's meat imports for 2012 by ensuring that imports did not exceed 20 percent of total demand or a volume of 85,000 tons); Anggi M. Lubis, "Failure of Self-Sufficiency Program in Sight," *Jakarta Post*, July 23, 2013 (Exh. US-7) (stating that, in 2012, import permits for live cattle were cut by 30% and import permits for beef meat were cut by almost 60%).

3. None of the Challenged Measures Would Meet the Necessity Test

135. In addition, even if the Panel found that any of the challenged measures were designed to secure compliance with some WTO-consistent law or regulation, Indonesia would have to show that the measure was "necessary" to the achievement of that objective. For a measure to be "necessary" to its covered objective, it would have to make a contribution to that objective – *i.e.*, there would have to be a "genuine relationship of ends and means" between the measure and the objective[223] – and that contribution would have to be "significantly closer to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution to.'"[224] Further, the contribution would be balanced against the measure's level of trade-restrictiveness.[225] None of the challenged measures would meet this standard.

a. Application Windows and Validity Periods of Required Import Documents

136. Indonesia asserts that the application windows and validity periods for the documents required to import horticultural products and animal products are "a necessary component [of] Indonesia's custom's regime."[226] Specifically, Indonesia argues that the requirements "contribute to Indonesia's ability to allocate resources effectively among its many ports by providing advance notice of expected import volumes in a timely fashion," and states that Indonesia cannot "effectively manage unspecified import volumes on a rolling basis."[227] Indonesia also argues that it "has limited resources to devote to processing import license applications."[228]

137. With respect to Indonesia's first argument, it is not clear that the application windows and validity periods would make any contribution at all to Indonesia's ability to allocate customs resources among its ports. According to Indonesia's own argument, importers do not in practice limit their imports to the particular ports specified on their Import Approvals.[229] Therefore, Indonesian officials only would know at the beginning of the period due to the application windows and validity periods the maximum permitted imports for that period and the ports where such imports could possibly be brought in. It is unclear how resources could be allocated among ports based on this information.

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[223] *Brazil – Retreaded Tyres (AB)*, para. 210; *EC – Seal Products (AB)*, para. 5.180 (citing *EC – Seal Products (Panel)*, para. 7.633).

[224] *See Korea – Various Measures on Beef (AB)*, para. 161; *Brazil – Retreaded Tyres (AB)*, para. 141.

[225] *Korea – Various Measures on Beef (AB)*, paras. 161-163; *Brazil – Retreaded Tyres (AB)*, para. 141; *EC – Seal Products (AB)*, para. 5.169.

[226] Indonesia's First Written Submission, paras. 136, 163; Indonesia's Opening Statement, para. 31.

[227] Indonesia's Response to Advance Panel Question No. 14, para. 6.

[228] Indonesia's First Written Submission, para. 136; Indonesia's Opening Statement, para. 31.

[229] Indonesia's First Written Submission, para. 139.

138. Further, a less trade-restrictive way to actually achieve the objective of "providing advance notice of expected import volumes in a timely fashion" would be have an import licensing regime that was truly "automatic." That is, importers could apply on any day prior to the customs clearance of goods and could receive permission to import goods of the type and quantity requested through the port of entry specified. Such a regime could be administered in the same way as the current regime, and would, therefore, be "reasonably available" to Indonesia.[230] It would, however, provide more accurately and timely notice of the products importer plan to bring in, and, therefore, would *better* assist Indonesia in allocating resources.

139. It is unclear how Indonesia's second argument – that it has limited resources to devote to processing import licensing applications – is related to customs enforcement at all. Import licensing applications are processed by the Ministry of Agriculture and the Ministry of Trade, not the Directorate General of Customs and Excise in the Finance Ministry.[231] Thus, even if the application windows and validity periods conserve resources for officials processing the import licensing applications (and Indonesia has not explained how that would be the case), that would make no contribution to customs enforcement.

140. Moreover, the application windows and validity period requirements are very trade-restrictive, effectively halting U.S. products' access to the Indonesian market for several weeks out of each import period and several months out of the year.[232] A measure would have to make a significant contribution to its covered objective to justify this level of trade-restrictiveness.

141. Thus, even putting aside Indonesia's failure to identify a relevant "law or regulation" or demonstrate that the application windows and validity periods relate to customs enforcement in any way, the application window and validity period requirements could not be justified as meeting the "necessary" standard with respect to this objective.

b. Fixed License Terms

142. Indonesia asserts that the fixed license terms – that is, the inability of importers, during a validity period, to import products other than those of the type, quantity, country of origin, and port of entry specified on their required import documents, or to amend those permits or apply for new permits once the validity period has begun[233] – are "necessary for Indonesia's customs enforcement" because they give "customs authorities an opportunity to allocate their limited resources accordingly."[234] Indonesia also argues that it has limited resources "to devote to

[230] *See Brazil – Retreaded Tyres (AB)*, para. 156; *US – Gambling (AB)*, para. 308.

[231] *See* U.S. First Written Submission, paras. 37-44, 100-103.

[232] *See supra* sec. II.B.2.a.

[233] U.S. First Written Submission, paras. 50-55; 116-120.

[234] Indonesia's First Written Submission, paras. 140, 163.

processing import license applications."[235] Neither of these explanations of the relationship between the challenged measures and "customs enforcement" meets the necessary standard.

143. First, it is difficult to see how the fixed license terms make any contribution to securing compliance with customs enforcement, let alone one rising to the level of "necessary." The fixed license terms requirement is not a schedule of what products will be imported when and where, such that Indonesia could use the terms to allocate its customs resources. Rather, it is an overall restriction on all the products that could possibly be imported during a given period. That is, under the fixed license terms requirement, importers are required to predict in advance precisely the type, quantity, and country of origin of all the products that they want to import for the coming import period of six or three months and are then prohibited from importing products any different from those they applied to import or from applying for additional import permits. This high level of trade-restrictiveness is not in proportion to any minimal contribution the measure could theoretically make to customs enforcement.

144. Further, if Indonesia wanted advance information about import volumes and locations, a reasonably available alternative measure would be to allow importers to apply for (truly automatic) licenses to import products of whatever type, quantity, country of origin they choose. Allowing importers to amend or update this information based on market considerations would ensure that this information was as accurate and timely as possible. That would give Indonesia better information about the products to be imported and would require fewer resources to manage. Such an alternative measure also would eliminate the trade-restrictiveness of the measure by allowing importers to make timely import decisions based on commercial considerations and current market conditions.

145. Second, as described above, the Indonesian offices responsible for processing import license applications are not the same as those responsible for customs enforcement. Consequently, even if the fixed license terms requirements did make processing import permit applications easier (an assertion Indonesia has not explained) it is unclear how that would make any contribution to the objective of customs enforcement.[236]

146. Thus, even if Indonesia had identified a WTO-consistent law or regulation relating to customs enforcement with which the fixed license terms are supposedly "necessary to secure compliance," and even if the Panel found that the measure was designed to secure compliance with that law or regulation, (neither of which is the case), the fixed license term measure still could not be justified as meeting the "necessary" standard with respect to this objective.

c. Realization Requirements

147. Indonesia argues that the 80% realization requirement is "necessary for Indonesia's customs enforcement" because it serves as a "safeguard against importers grossly overstating

[235] Indonesia's First Written Submission, para. 136; Indonesia's Opening Statement, para. 31.

[236] *See supra* para. 139.

their anticipated imports," which is necessary because Indonesia has limited resources and, therefore, "an estimate of expected trade volumes for each validity period."[237] However, this argument fails for several reasons.

148. First, Indonesia has not provided any evidence that a problem with importers grossly overstating their anticipated imports exists, or explained how, if such a problem did exist, this would impose a burden on customs officials. Even assuming that an importer overstated the requested quantity on its Import Approval application, Indonesia's argument presumes that he would not in fact be importing a large volume of horticultural products. Thus, overstatement would not necessarily mean *any* increased burden on the customs officials processing imports.

149. Second, Indonesia's argument concerning "misallocation of limited resources" as a result of over-statement is based on the assumption that the import licensing requirements operate to provide customs officials with appropriate information about planned imports.[238] But, as discussed above in the context of the application windows and validity periods and fixed license terms requirements, this is not the case. Importers are *not* required to provide details on precisely when and where products will be imported. Rather, like the fixed license terms requirement, the realization requirement is simply a quantitative restriction, forcing importers to reduced their planned imports. There is, therefore, no evidence either that customs officials (as distinguished from the Ministry of Agriculture and Trade officials) obtain *any information at all* from the realization requirement, much less accurate information on when and where imports will occur such that they could make appropriate resource allocation decisions.

150. Third, Indonesia's argument ignores the fact that any over-estimation problem (and Indonesia has not presented evidence that one exists) would not exist without the application windows and validity periods and the fixed license term requirements imposed by Indonesia's import licensing regimes. That is, if importers were not prohibited for applying for additional permits once a period started or from importing products other than those on their permits, there would be no incentive for over-estimation. In fact, there would be no need for estimation at all, as importers could seek permits based on their actual imports. Thus, a less trade-restrictive and more accurate way to collect information on import volumes would be to allow importers to apply for permits at any time prior to customs clearance, and on a rolling basis. Indeed, if Indonesia removed the challenged measures at issue in this dispute, all of which restrict importation into the Indonesian market, it would almost certainly provide more accurate and timely information regarding importation.

151. Further, any marginal contribution the realization requirement could make to saving customs resources must be weighed against the trade restrictiveness of the measure. This requirement leads importers to reduce the quantity they request on their Import Approval and

[237] Indonesia's First Written Submission, paras. 142, 145, 163; Indonesia Opening Statement, paras. 22, 31; Indonesia's Response to Panel's Question No. 50, para. 32.

[238] Indonesia's Response to Panel Question No. 50, para. 32.

thereby restricts overall import volumes for every import period.[239] It also makes importers who do not meet the requirement *ineligible* to import in future periods. This is a very trade-restrictive measure, and would be outweighed only by a significant contribution to the covered objective. As discussed immediately above, removal of Indonesia's restrictive licensing requirements would better contribute to Indonesia's stated objective, and would eliminate the trade-restrictive effect of those measures.

152. Thus Indonesia's defense of the realization requirement must fail, even if Indonesia were able to satisfy the first element of Article XX(d).

d. Storage Capacity Requirements for Horticultural Products

153. Indonesia asserts that the storage capacity restriction on the importation of horticultural products is "necessary to secure compliance with customs enforcement."[240] Indonesia's explanation is that, due to its limited resources for customs enforcement, "ensuring that all importers (i) have facilities to store their imported horticultural goods immediately upon their arrival; and (ii) providing government officials with information about these facilities *in advance* of their arrival in Indonesia" is necessary to the "proper operation" of Indonesia's customs laws.[241] This argument is based on flawed legal and factual premises and is not sufficient to sustain a defense under Article XX(d).

154. Indonesia has not explained how importers' ownership of storage capacity would be at all relevant to enforcement of Indonesia's customs laws. Even assuming that problems have or could arise in Indonesia concerning inadequate storage for horticultural products (a theoretical problem about which Indonesia has not presented any evidence), these problems would presumably arise after the products had already entered Indonesia – that is, *after* they had already cleared customs. It is thus unclear how a storage capacity ownership requirement could contribute to customs enforcement.

155. Further, Indonesia's arguments provide no explanation or justification of the two most trade-restrictive aspects of the storage capacity requirement, *i.e.*, the requirement to *own* storage capacity and the one-to-one ratio of owned storage capacity to *total* imports allowed entry during a semester. As described in the U.S. First Written Submission, these two aspects of the requirement significantly limit the quantity of horticultural products that importers can apply to import compared to what they would import under normal commercial circumstances.[242] However, neither of these requirements relate to Indonesia's explanation of the measure's purpose. Thus a significantly less trade-restrictive way to achieve the objective of ensuring importers can store their horticultural products on arrival and providing officials with

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[239] *See* U.S. First Written Submission, paras. 171-174, 284-287; NHC Statement, at 3 (Exh. US-21); ASEIBSSINDO Letter (Exh. US-28).

[240] Indonesia's First Written Submission, para. 149; Indonesia's Opening Statement, para. 31.

[241] Indonesia's First Written Submission, para. 149.

[242] U.S. First Written Submission, paras. 187-191.

information on these facilities in advance would be to remove the ownership and one-to-one ratio requirements and to allow importers to lease storage capacity and to account for inventory turnover during a semester in their Import Approval applications. An even less trade-restrictive alternative would be to allow importers to transfer products directly to a distributor's warehouse from the port of entry.[243]

156. Indonesia's Article XX(d) defense of the storage capacity requirement would fail even if Indonesia had identified a WTO-consistent law or regulation, because Indonesia has not shown that the measure is, in fact, designed "to secure compliance" with customs enforcement.

e. Use, Sale, and Transfer Restrictions for Horticultural Products

157. In defense of its use, sale, and transfer restrictions on importation of horticultural products, Indonesia asserts that this measure is in accordance with Article XX(d) because it is necessary "to secure compliance with Indonesia's food safety requirements."[244] Specifically, Indonesia explains that "limiting the distribution channels available to certain imports" allows officials "with limited resources" "to track the origin of products that contain pathogenic bacteria and therefore reduce the spread of such bacteria into the food supply."[245] Indonesia does not identify any WTO-consistent law or regulation with which it argues the use, sale and transfer restrictions are necessary to secure compliance. Nor does Indonesia present any evidence that the challenged measure is, in fact, designed to secure compliance with such a law or regulation.[246] On this basis alone, Indonesia's defense must fail.

158. Even if Indonesia had done those things, however, the measure would not meet the "necessary" standard.

159. First, Indonesia has provided no explanation of how the requirement that horticultural products imported for consumption be sold only through a distributor would allow importers to better track bacteria in the food supply. The challenged measure does not limit the retail outlets where imported horticultural products ultimately can be sold.[247] Rather, the measure simply requires the inclusion of an additional entity in the supply chain for imported horticultural products sold for consumption, thereby artificially extending the supply chain and imposing additional, unnecessary costs on importation.[248] Indeed, if anything, lengthening the supply chain would seem likely to make tracking products *more* difficult rather than easier.

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[243] U.S. Opening Statement, para. 28.

[244] Indonesia's First Written Submission, para. 160; Indonesia's Opening Statement, para. 34.

[245] Indonesia's First Written Submission, para. 160; Indonesia's Opening Statement, para. 34.

[246] *See* Indonesia's Response to Panel Question No. 71, para. 47.

[247] U.S. First Written Submission, para. 193.

[248] U.S. First Written Submission, paras. 194-195.

160. Further, to the extent that Indonesia is advancing a defense of the whole challenged measure, it has advanced no explanation for the prohibition on producer-importers of horticultural products ("PI") transferring or selling products not used in their own production process. Therefore, even if Indonesia could sustain a defense of the requirement that importers sell directly to distributors only – which it cannot – Indonesia still would not have established a defense of the measure as challenged by co-complainants.

161. Second, Indonesia's argument ignores the fact that Indonesia *also* has health and sanitary and phytosanitary ("SPS") requirements that apply to covered horticultural products. Specifically, importers of fresh horticultural products must obtain a health certificate and a phytosanitary certificate prior to importation.[249] Because the use, sale, and transfer requirements make no demonstrated contribution to tracking bacteria in the food supply, a less trade-restrictive alternative measure that preserves Indonesia's chosen level of protection with respect to bacteria in the food supply would be to eliminate the requirement altogether and continue to rely instead on these other requirements, which relate specifically to Indonesia's stated objective, food safety.

162. Thus, even if Indonesia had met the first element of Article XX(d) of demonstrating that the use, sale, and transfer restrictions were designed "to secure compliance" with some identified WTO-consistent law or regulation, Indonesia's Article XX(d) defense would fail.

f. Import Licensing Regimes as a Whole

163. In its final defense under Article XX, Indonesia asserts that its import licensing regimes for horticultural products and for animals and animal products "as a whole" are justified under subparagraph (d) of Article XX, *inter alia*.[250] Indonesia provides no further explanation and fails to identify what the relevant WTO-consistent law or regulation might be with which the regimes, as a whole, are necessary to secure compliance.

164. We assume for the sake of argument that Indonesia's defense of the regime as a whole may be derivative of its defenses of the individual components of the regime. If this is Indonesia's argument, its defense under Article XX(d) must fail for the same reasons its defenses under the above five measures fail. That is, because Indonesia has not established that any of the individual prohibitions and restrictions at issue in this dispute are "necessary" to "secure compliance" with "customs enforcement" (or, in the case of the use, sale, and transfer restrictions, any food safety requirements), Indonesia has also failed to make such a showing with respect to the import licensing regimes as a whole. Indeed, Indonesia has not shown that the import licensing regimes make any contribution to customs enforcement or to compliance with Indonesian food safety laws.

[249] MOT 16/2013, as amended by MOT 47/2013, art. 22(1) (JE-10).

[250] Indonesia's First Written Submission, paras. 162, 170.

165. Moreover, any small contribution that the regimes might make to one of these objectives would have to be "necessary" even in light of the extremely trade-restrictive effect of the regimes as a whole.

166. As described in the U.S. First Written Submission, the interaction and combined operation of the individual challenged measures is such that the regimes, as a whole, are significantly more trade-restrictive than the measures considered in isolation.[251] For example, certain of the challenged measures limit the quantity of products that importers can apply for permission to import (which is trade-restrictive in itself), but then the fixed license term requirements prohibit importers from altering the types and quantities of products originally requested, such that they cannot change their behavior based on market circumstances. Further, the application window and validity period requirements mean that, in addition to the restrictions just described, importers are effectively precluded from making imports altogether during several months out of each year, because the operation of Indonesia's measures means that imports made at the beginning and end of each period would not be covered by a valid permit.

167. Such a measure would have to make a significant contribution to an important objective in order to justify this high level of trade-restrictiveness. As discussed above with respect to most of the individual trade restrictions imposed by Indonesia, elimination of the underlying restrictions, imposition of an automatic import licensing regime and continued reliance on other more relevant measures related to food safety would all provide reasonably available alternative measures Indonesia could take to remediate the inconsistencies under Articles XI:1 and 4.2. Thus, Indonesia's Article XX(d) defenses of the regimes, as a whole, fail.

C. None of the Challenged Measures Is "Necessary To Protect Human . . . Life or Health" Under Article XX(b)

168. Indonesia asserts defenses under Article XX(b) with respect to the co-complainants' claims against: (1) the seasonal restrictions for horticultural products; (2) the storage capacity requirements for horticultural products; (3) the use, sale, and transfer restrictions for horticultural products; (4) the six month requirement for horticultural products; (5) the Reference Price requirements; (6) the end-use restrictions for animal products; (7) the domestic purchase requirement for beef products; (8) the import licensing regimes as a whole; and (9) the domestic sufficiency requirement.[252]

169. To establish that one of these measure is preliminarily justified under Article XX(b), Indonesia must establish: (1) that "the objective pursued by" the measure is "to protect human, animal or plant life or health"; and, (2) that the measure is "necessary" to the achievement of its objective.[253] Indonesia has not met either element with respect to any of its defenses.

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[251] U.S. First Written Submission, paras. 211-216, 318-326.

[252] *See* Indonesia's First Written Submission, paras. 148, 151, 154, 155, 160, 161, 162, 167, 169, 170, 188.

[253] *Brazil – Retreaded Tyres (AB)*, paras. 144-145; *see also EC – Seal Products (AB)*, para. 5.169 (finding that, to make out a defense under Article XX(a), the responding Member had to show: (1) "that it has adopted or

1. Seasonal Restrictions on Horticultural Products

170. Indonesia asserts that the seasonal prohibitions and restrictions on the importation of horticultural products are "necessary to protect human, animal, or plant life or health." Specifically, Indonesia argues that, "[i]n the absence of Indonesia's coordination of imports with domestic harvest times," "[o]versupply of fresh horticultural products in a particular region of Indonesia's vast archipelago could have disastrous consequences," namely "stockpiles of rotting fresh horticultural products [that] are likely to result in serious public health threats."[254] Therefore, Indonesia asserts, it takes a "proactive approach" by "ensuring that imports are directed elsewhere in Indonesia during domestic harvest periods – not prohibited altogether or restricted to certain quantities."[255] Indonesia's arguments do not satisfy the elements of an Article XX(b) defense.

171. First, Indonesia has not demonstrated that protection of human health is, in fact, an "objective pursued by" the measure, as required under the first element of Article XX(b). The one piece of evidence Indonesia refers to on this point is the fact that the Food Security Council publishes "regular points summarizing its goals and directives," which, Indonesia asserts, the Ministry of Agriculture considers in determining when importation of particular products is permitted.[256] However, Indonesia's exhibit does not refer to the Ministry of Agriculture's seasonal restrictions on importation or to over-supply of horticultural products at all.[257] Further, its list of the thirteen legal instruments adopted to promote food safety and security do not include Indonesia's import licensing regulations.[258] Thus Indonesia has simply asserted that the measure's objective is protecting human health, but has introduced no evidence substantiating that assertion. As the Appellate Body has recognized, a bare assertion of the measure's objective does not satisfy the first element of Article XX(b).[259]

172. Further, the co-complainants have demonstrated that the actual purpose of the measure, and the basis on which the Ministry of Agriculture implements the seasonal restrictions, is the protection of domestic producers from competition with imported products. In a letter dated December 3, 2015 to the head of the Indonesia Horticultural Products Importers Association ("ASEIBSSINDO"), the Ministry of Agriculture's Director of General of Horticulture stated that "commodities not produced domestically may be imported" during the 2016 RIPH issuance

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enforced a measure 'to protect public morals;'" and, (2) that the measure is "'necessary' to protect such public morals").

[254] Indonesia's First Written Submission, para. 155; Indonesia's Opening Statement, para. 33.

[255] Indonesia's First Written Submission, para. 155; Indonesia's Opening Statement, para. 33.

[256] Indonesia's Response to Advance Panel Question No. 17, para. 14.

[257] Ministry of Agriculture, Agency for Food Security, "At a Glance" (2013) (Exh. IDN-25).

[258] Ministry of Agriculture, Agency for Food Security, "At a Glance," p. 9-10 (2013) (Exh. IDN-25).

[259] *EC – Seal Products (AB)*, para. 5.144 (stating that panels "should take into account the Member's articulation of the objective or the objectives it pursues through its measures, but it is not bound by that Member's characterization of such objective(s)").

period.[260] The letter also discussed the domestic production of oranges and called for prioritizing the use of oranges of domestic origin to supply the demand during Chinese New Year.[261] Subsequent letters confirmed that oranges cannot be imported during January.[262] Other Indonesian ministers have also confirmed that the purpose of the harvest period restriction is to "protect local horticultural products."[263]

173. Even if the first element of Article XX(b) were satisfied, however, the restriction would not meet the "necessary" standard. Although Indonesia asserts that oversupply of fresh horticultural products "could have disastrous consequences," it has not presented any evidence that shows oversupply either occurs or has any negative consequences for human health. Thus it is not clear that the measure would make any "contribution" to its purported objective. Without a "genuine relationship of ends and means" between the measure and the objective, a measure is not "necessary" to the achievement of that objective.[264]

174. Additionally, even if the measure made some contribution to the protection of human health, several less trade-restrictive alternative measures are available to Indonesia. First, Indonesia appears not to have justified the measure as challenged by co-complainants, in that the Ministry of Agriculture has (and exercises) authority to prohibit completely into all regions of Indonesia importation of horticultural products, based on their harvest period, not merely importation into specific areas.[265] Therefore, one possible less trade-restrictive alternative measure (again, if it were shown that such a measure could contribute to the protection of human health) would be to confine harvest period restrictions to those regions in which the harvest was occurring. Second, Indonesia has not presented any evidence showing that, even if over-supply occurred, it would not be resolved by market forces. That is, if importation of certain products was not commercially viable due to true over-supply, importation would slow or even stop of its

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[260] Letter from Dr. Ir. Spudnik Sujono K. MM, Director General, Directorate of Horticulture, Ministry of Agriculture, to General Secretary of ASEIBSSINDO, Dec. 3, 2015 (Exh. US-70) ("MOA December 3 Letter").

[261] MOA December 3 Letter (Exh. US-70).

[262] Letter from Dr. Ir. Spudnik Sujono K. MM, Director General, Directorate of Horticulture, Ministry of Agriculture, to General Secretary of ASEIBSSINDO, Dec. 21, 2015 (Exh. US-71) ("MOA December 21 Letter"); Letter from Hendra Juwono, ASEIBSSINDO to the Minister of Agriculture, Dec. 7, 2015 (Exh. US-72) ("December 7 Letter").

[263] Chief Economic Minister Defends Ban on Horticultural Import," *Antaranews*, Feb. 7, 2013 (Exh. US-13); Waris Gusmiati, "Ministry of Agriculture: Horticulture Imports Not Prohibited but Regulated," *Berita 2 Bahasa*, Mar. 2, 2013 (Exh. US-14).

[264] *Brazil – Retreaded Tyres (AB)*, para. 210; *EC – Seal Products (AB)*, para. 5.180 (citing *EC – Seal Products (Panel)*, para. 7.633).

[265] *See* U.S. First Written Submission, paras. 180-181; MOA 86/2013, art. 5 (JE-15); Letter from Dr. Ir. Spudnik Sujono K. MM, Director General, Directorate of Horticulture, Ministry of Agriculture, to General Secretary of ASEIBSSINDO, Dec. 3, 2015 (Exh. US-70); Letter from Dr. Ir. Spudnik Sujono K. MM, Director General, Directorate of Horticulture, Ministry of Agriculture, to General Secretary of ASEIBSSINDO, Dec. 21, 2015 (Exh. US-71) (stating that oranges could not be imported during January and lemons could not be imported from January to March 2016).

own accord. Another alternative would be to eliminate the seasonal restrictions and allow market forces to resolve any oversupply problem.

175. Thus, Indonesia has not demonstrated that the seasonal restrictions on horticultural products pursue the objective of protecting human health, let alone that they are "necessary" to such an objective. Consequently, Indonesia's Article XX(b) defense must fail.

2. Storage Capacity Requirements for Horticultural Products

176. Indonesia argues that the storage capacity restrictions on the importation of horticultural products are justified because "Indonesia's limited capacity to store imported fresh horticultural products after their arrival but before their transfer to the distributor or other end user," combined with "the equatorial climate in Indonesia," create a "heightened risk of spoilage" and an "absolute need to ensure proper storage facilities in order to protect human, animal, and plant life or health."[266] Indonesia's argument fails to satisfy the requirements of Article XX(b).

177. First, as with the seasonal restrictions discussed above, Indonesia has presented no evidence that the objective of the challenged measure is, in fact, the protection of human health. To the contrary, all the evidence presented by the co-complainants suggests that the true objective of Indonesia's import licensing regime for horticultural products is the protection of domestic producers from competition with imported products.[267] Indonesia's bare assertion to the contrary is not sufficient to satisfy the first element of Article XX(b).[268]

178. Further, even if the Panel were to find that the measure did, in part, pursue the objective of protecting human health, it is unclear how the challenged measure could be "necessary" to the achievement of that objective.[269] Indonesia requires that importers own storage capacity sufficient to hold all the horticultural products they will import during an entire import period.[270] However, an importer's *ownership* of storage facilities has no relationship with the *sufficiency* of storage capacity. Rather, it is common practice under normal market conditions for importers to lease storage capacity.[271] Further, importers would generally empty and refill storage space several times over the course of the semester. Consequently, requiring importers to own enough storage to hold, at the same time, *all* the horticultural products that they would import for the entire six-month semester would not be necessary to ensure refrigeration of an importer's products, as they might be required to own ten times more than is needed at any one time.

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[266] Indonesia's First Written Submission, para. 148.

[267] *Supra* para. 133; U.S. First Written Submission, paras. 16, 84-85.

[268] *EC – Seal Products (AB)*, para. 5.144 (stating that panels "should take into account the Member's articulation of the objective or the objectives it pursues through its measures, but it is not bound by that Member's characterization of such objective(s)").

[269] *Brazil – Retreaded Tyres (AB)*, para. 210; *EC – Seal Products (AB)*, para. 5.180 (citing *EC – Seal Products (Panel)*, para. 7.633).

[270] MOT 16/2013, as amended by MOT 47/2013, art. 8(1)(e) (JE-21); ASEIBSSINDO Letter (Exh. US-28).

[271] ASEIBSSINDO Letter (Exh. US-28).

Therefore, requiring ownership of storage capacity, and in such large amounts, cannot be said to be "necessary to protect human health."

179. Indeed, a significantly less trade-restrictive way to achieve the objective of ensuring importers can store their horticultural products on arrival and providing officials with advance information on these facilities would be to remove both the ownership and one-to-one ratio requirements altogether and to allow importers to lease as much storage capacity as is needed at any given time during an import period. Importers could continue to provide storage capacity information for each semester in their Import Approval applications. This requirement would contribute to the stated objective to at least the same degree as Indonesia's current measures, would be no more difficult to administer, and would be significantly less trade-restrictive than the current requirement.

180. Therefore, Indonesia's Article XX(b) defense of the storage capacity requirement fails because Indonesia has not demonstrated that the requirement pursues the objective of human health and has certainly not shown that it is "necessary" to such objective.

3. Use, Sale, and Transfer Restrictions for Horticultural Products

181. Indonesia claims that the use, sale, and transfer restrictions on importation of horticultural products satisfy Article XX(b) because they limit "the distribution channels available to certain imports," such that "Indonesian officials with limited resources are better able to track the origin of products that contain pathogenic bacteria and therefore reduce the spread of such bacteria into the food supply of the general public."[272] Indonesia explains that the measure ensures that imported products "are moved through channels of distribution that are highly traceable, as opposed to through the ephemeral network of open air markets."[273] In asserting these arguments, however, Indonesia has not established that the measure is justified under Article XX(b).

182. First, Indonesia did not point to any evidence in the text, structure, or operation of the measure that "the objective pursued by" the measure is the protection of human health.[274] For example, there is no evidence that Indonesia imposes any requirements on distributors to track in any way the products that they buy from importers and sell to retail markets, including traditional wet markets. Nor are there any statements on the record or in the text of the regulations suggesting that these requirements otherwise serve a health-related purpose.

183. Second, even if the measure did pursue an objective covered by Article XX(b), no contribution to that objective has been shown, and certainly not one that meets the "necessary"

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[272] Indonesia's First Written Submission, para. 160.

[273] Indonesia's First Written Submission, para. 160.

[274] *Brazil – Retreaded Tyres (AB)*, paras. 144-145; *see also EC – Seal Products (AB)*, para. 5.169 (finding that, to make out a defense under Article XX(a), the responding Member had to show: (1) "that it has adopted or enforced a measure 'to protect public morals;'" and, (2) that the measure is "'necessary' to protect such public morals").

standard. As described previously, Indonesia appears to be justifying the wrong measure.[275] The challenged measure limits the *persons* to whom imported horticultural products can be sold, not the products' ultimate destination. Imported products could be, and are, sold through open air markets, provided they are *first* sold to a distributor. The requirement simply lengthens the supply chain (likely making tracking more difficult). Further Indonesia has advanced no justification of the prohibition on PIs transferring or selling products not used in their production process. Thus, because the measure makes no (or little) contribution to the objective, a less trade-restrictive alternative would be for Indonesia to eliminate the requirement and continue to rely on its health and SPS requirements for preventing the spread of pathogenic bacteria.[276]

184. Indonesia's Article XX(b) defense fails, therefore, because Indonesia has not shown that the use, sale, and transfer restrictions on horticultural products are "necessary" to protect "human health," or even that they pursue this objective at all.

4. Six-Month Harvest Requirement for Horticultural Products

185. According to Indonesia, the prohibition on the importation of fresh horticultural products harvested more than six months previously is "necessary for the protection of human, plant, or animal life or health" under Article XX(b).[277] Indonesia explains that the requirement "has no bearing" on whether horticultural products can be sold to consumers more than six months after harvest (indeed Indonesia acknowledges that there are horticultural products that "can be stored for more than six months, i.e. apples, when properly refrigerated").[278] However, "Indonesian health authorities would prefer such produce to be stored locally" where it can be inspected. Indonesia notes that due to Indonesia's "equatorial climate, proper food storage is of utmost importance."[279] Based on these arguments, Indonesia has not addressed, let alone satisfied, all of the elements of an Article XX(b) defense.

186. The first element of Article XX(b) – that "the objective pursued by" the measure is "to protect human, animal or plant life or health" [280] – is not met because, as with the other challenged measures, Indonesia has presented no evidence to suggest that this measure, in fact, pursues the objective of ensuring food safety. Further, Indonesia has not rebutted the evidence submitted by the co-complainants that the actual purpose of all of Indonesia's import licensing requirements, including the storage ownership requirement, is the protection of domestic producers from competition from imports.

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[275] *See supra* paras. 159-161; U.S. Opening Statement, para. 35.

[276] *See supra* para. 161.

[277] Indonesia's First Written Submission, para. 153.

[278] Indonesia's First Written Submission, paras. 150-151.

[279] Indonesia's First Written Submission, para. 151; Indonesia's Opening Statement, para. 32.

[280] *Brazil – Retreaded Tyres (AB)*, paras. 144-145.

187. Even if the objective of the measure were, in part, the protection of human health, the second element of Article XX(b) would not be satisfied because Indonesia has not shown how the measure would make any contribution to food safety, let alone one rising to the level of being "necessary." Indonesia has not even asserted that the requirement is "necessary" to food safety, merely stating that health authorities "prefer" products to be stored locally. We note that there is no evidence in the text of the measure or elsewhere to suggest that the Ministries of Agriculture or Trade inspect horticultural products while they are stored in Indonesia, which is the crux of Indonesia's argument. Moreover, Indonesia's reference to its "equatorial climate" serves to undermine rather than support its argument that, for food safety purposes, it is better for importers to store products in Indonesia.

188. Finally, Indonesia's argument ignores the fact that, as described above, Indonesia has health and SPS requirements in place that apply to horticultural products.[281] These include the requirement that all imported horticultural products be accompanied by a Health Certificate and an SPS certificate. Both of these certificates, along with the products to be imported, must be inspected in the products' country of origin before they are shipped to Indonesia.[282] Since all horticultural product imports are certified as meeting Indonesia's health and SPS standards prior to their being shipped, a less trade-restrictive (and reasonably available) alternative measure would be to continue to rely on these requirements and not impose, in addition, the six-month requirement, which is highly trade-restrictive and makes no apparent contribution to food safety.

189. Thus, Indonesia has not established that the six-month requirement has any connection to the protection of human health – either as an objective or in terms of an actual contribution –and Indonesia's Article XX(b) defense accordingly fails.

5. Reference Price Requirements

190. Indonesia asserts that the Reference Price requirements for chilies and shallots, on the horticultural products side, and for cattle and bovine products, on the animals and animal products side, are justified under Article XX(b) because they form an "integral part of Indonesia's food safety and security plan."[283] Specifically, Indonesia asserts that it is a "tool" Indonesia uses to protect against "harmful oversupply of perishable food items in equatorial heat" and against the consequences of "extreme price volatility.[284] Indonesia's arguments fail for several reasons.

191. Indonesia has not referred to anything in the text, structure, or legislative history of the Reference Price requirement suggesting that the "objective pursued by" the Reference Price requirements is the protection of human health. Rather, Indonesia's argument rests entirely on its assertion to the Panel that this is the case. The one exhibit that Indonesia presented on its

[281] *See supra* para. 161.

[282] MOT 16/2013, as amended, arts. 21-22(g)-(h).

[283] Indonesia's First Written Submission, paras. 154, 167.

[284] Indonesia's Response to Advance Panel Question No. 18, para. 18.

food security plan,[285] which described the agency responsible for the plan, makes no mention of the Reference Price requirements, any over-supply problem, or Indonesia's import licensing regimes more generally.[286] Thus, Indonesia has not shown that the objective of its Reference Price requirements is to protect human health.

192. Even if protection of human health were the objective of the challenged measures, however, the measure is not "necessary" to achieving this objective. Indonesia has not presented any evidence that the Reference Price requirements make any contribution to the protection of human health. Indeed, despite its assertion that "oversupply" of horticultural product food items is a health threat, Indonesia presents no evidence that an oversupply problem exists and even acknowledges that food scarcity and under-nutrition are persistent problems in Indonesia.[287] In fact, supply shortages of chili and shallots are both prevalent and harmful in Indonesia.[288] Similarly, Indonesia asserts that the Reference Price for beef guards against "harmful oversupply," but the relevant evidence on the record shows that, to the contrary, Indonesia has been suffering from a severe beef scarcity for at least the past year.[289] Thus it is unclear how the Reference Price requirements make any contribution to Indonesia's stated objectives.

193. Further, even if the requirement did make a contribution to the protection of human health, it would have to be "necessary" in light of the significant trade-restrictiveness of the measure in order to satisfy Article XX(b). Indonesia attempts to downplay the trade-restrictiveness of the Reference Price system by noting that that the prohibition "is not continuously in effect."[290] However, Indonesia ignores the fact that the Reference Price requirement conditions all importation of the covered products on the Indonesian market prices

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[285] Indonesia's Response to Advance Panel Question No. 18, para. 18; Indonesia's Response to Advance Panel Question No. 27, para. 27.

[286] Ministry of Agriculture, Agency for Food Security, "At a Glance," p. 9-10 (2013) (Exh. IDN-25).

[287] Indonesia's First Written Submission, paras. 18-19. Indeed, recent studies have suggested that Indonesians' per capita consumption of fruits and vegetables (about 30-35 kg per person per year, by recent estimates) remains well below the FAO standard of 65.75 kg/capita/person. *See* Ahmad Dimyati & Sri Kuntarsih, FAO, *Fruit and Vegetable Development Program for Human Health in Indonesia*, at 9 (2006) (Exh. US-99); *see also* December 7 Letter (Exh. US-72).

[288] *See* "Import Restrictions Eased as Prices Soar," *FoodTechIndonesia.com*, July 7, 2013, http://www.thejakartapost.com/news/2013/07/11/import-restrictions-eased-prices-soar.html (Exh. US-100); Zakir Hussain, "Indonesian Gov't Feels the Heat ad Food Prices Soar," *Straits Times*, July 24, 2013, http://news.asiaone.com/news/asia/indonesian-govt-feels-heat-food-prices-soar?nopaging=1#sthash.DVeawAmu.dpuf (Exh. US-101); Satria Sambijantoro, "Jokowi Gives Chili, Shallot Imports the Green Light," *Jakarta Post*, June 4, 2015, http://www.thejakartapost.com/news/2015/06/04/jokowi-gives-chili-shallot-imports-green-light.html#sthash.3cpRldNf.dpuf (Exh. US-102); "Trade Minister to Allow Chili Imports in June," *Tempo.co*, June 8, 2015, http://en.tempo.co/read/news/2015/06/08/056673108/Trade-Minister-to-Allow-Chili-Imports-in-June (Exh. US-103).

[289] *See, e.g.*, U.S. First Written Submission, paras. 304, 371; Hussain, "Indonesian Gov't Feels the Heat as Food Prices Soar," *Straits Times* (Exh. US-101).

[290] Indonesia's Response to Advance Panel Question No. 18, para. 20; Indonesia's Response to Advance Panel Question No. 27, para. 28.

of chilies, shallots, and secondary cuts of beef remaining above their respective Reference Prices, and imposes a complete ban on these products if prices fall below this level.[291] Additionally, the Reference Price has a limiting effect on importation at all times because the threat of such a broad ban reduces the incentives for importation.[292] A measure would have to make a significant contribution to the objective of human health in order to justify this level of trade-restrictiveness. Indonesia has failed to make such a showing with respect to the Reference Price requirements for chilies, shallots and secondary cuts of beef and, consequently, its Article XX(b) defense fails.

6. End-Use Restrictions for Animal Products

194. Indonesia does not appear to have explicitly asserted an Article XX(b) defense with respect to the co-complainants' claim under Article XI:1 or Article 4.2 against Indonesia's end-use restrictions on the importation of animal products.[293] Nevertheless, some of Indonesia's subsequent argumentation seems premised on its having asserted such a defense,[294] and, since Indonesia did assert such a defense with respect to New Zealand's Article III:4 claim against the same measure,[295] we address Indonesia's arguments here.

195. Indonesia asserts that "animal products are not permitted to be sold in traditional Indonesian markets because of the extremely high risk of unsafe food handling that would result."[296] However, Indonesia presented no evidence that food safety is, in fact, the objective (or one of the objectives) in pursuit of which the end-use restrictions were imposed, as the first element of Article XX(b) requires.[297]

196. Indonesia also does not explain how the end-use restrictions are "necessary" to protect human health. The challenged measure prohibits the importation of non-beef animal products for sale in traditional markets and prohibits the importation of beef products for all retail sale.[298] Indonesia, however, has presented no evidence suggesting that imported frozen or thawed meat sold in traditional markets poses any greater risks to human health than freshly slaughtered local meat sold in those markets. Indeed, as described in the U.S. Opening Statement, the Indonesian government's own practices suggest that frozen beef does not pose a food safety risk, as the

[291] U.S. First Written Submission, paras. 199-200, 310-313.

[292] U.S. First Written Submission, paras. 314-315.

[293] Indonesia's First Written Submission, para. 166.

[294] *See* Indonesia's First Written Submission, para. 109; Indonesia's Opening Statement, para. 34.

[295] Indonesia's First Written Submission, para. 188.

[296] Indonesia's First Written Submission, para. 109.

[297] *Brazil – Retreaded Tyres (AB)*, paras. 144-145; *see also EC – Seal Products (AB)*, para. 5.169.

[298] U.S. First Written Submission, para. 292; U.S. Opening Statement, para. 29.

state-owned enterprise Bureau of Logistics ("Bulog") in fact relieves domestic meat shortages by selling imported frozen beef in traditional markets itself.[299]

197. Finally, to the extent that Indonesia is asserting a defense of the whole measure, the explanation relating to traditional markets has no relevance to the prohibition on importation for all retail sale (including in modern markets) of beef products. Having failed to demonstrate either that the objective of Indonesia's end-use requirements is the protection of human health or that the measure is necessary to achieve this objective, Indonesia's defense of its end-use restrictions on importation of animal products under Article XX(b) must fail.

7. Domestic Purchase Requirement for Beef Products

198. Indonesia argues that its domestic purchase requirement for the beef products listed in Appendix I to MOA 139/2013 is justified under Article XX(b) because "it is an integral part of Indonesia's food safety and security plan."[300] This assertion represents the entirety of Indonesia's Article XX(b) defense of this requirement. Indonesia has not referred to the text, legislative history, structure, or operation of the domestic purchase requirement, or presented any official statements or other evidence, to support its assertion. Indeed, Indonesia's defense is so minimal that it is difficult even to begin an analysis of whether the second element of Article XX(b) – whether the requirement is "necessary" to the achievement of its purported objective – has been satisfied.

199. It is possible to say, however, that Indonesia has presented no evidence, and none can be found on the record thus far, suggesting that the domestic purchase requirement makes any contribution at all to food safety and security. Indeed, it is not clear what the connection could possibly be between requiring importers, as a condition of importation of Appendix I products, to purchase from local slaughterhouses beef equivalent to 3 percent of the beef products being imported.[301] Further, even if a small contribution could be demonstrated, that contribution would have to be weighed against the trade-restrictiveness of the measure, which is significant, as the measure: (1) is designed to substitute imports for domestic products; (2) ties the permissible quantity of beef imports to the limited supply of local beef that is available for purchase towards the requirement; and, (3) adds unnecessarily to the costs of importation.[302] A measure would have to make a significant contribution to the protection of human health in order to justify this level of trade-restrictiveness, and Indonesia has made no such showing.

8. Import Licensing Regimes as a Whole

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[299] *See* U.S. Opening Statement, para. 29; Wiji Nurhayat, "Bulog Sells 8 tons of Cheap Imported Beef in 3 Markets of Jakarta Today," *detikfinance*, July 17, 2013, (Exh. US-62).

[300] Indonesia's First Written Submission, para. 169.

[301] Indonesia's First Written Submission, para. 169.

[302] U.S. First Written Submission, paras. 299-304.

200. Indonesia asserts that its import licensing regimes for horticultural products and for animals and animal products, as a whole, fall within the scope of Article XX(b).[303] As with the Article XX(d) defenses of the regimes as a whole, Indonesia does not explain or present evidence in support of these defenses. However, assuming that Indonesia's defenses of the regimes as a whole derive from its defenses of the individual challenged measures, they must fail for the same reasons. Indonesia has not established a defense under Article XX(b) with respect to any of the challenged measures, and therefore cannot rely on any such defense with respect to the regimes as a whole. As described above, Indonesia has not established that "the objective pursued by" any of the components of its import licensing regimes is "to protect human, animal or plant life or health," much less that it is "necessary" to the achievement of that objective.[304]

201. Moreover, any small contribution that the regimes might make to the protection of human health would have to be weighed against the trade-restrictiveness of the import licensing regimes as a whole. As described above in the context of Article XX(d) and in the U.S. First Written Submission, the two regimes as a whole are significantly more trade-restrictive than the measures considered in isolation due to the interaction and combined operation of the individual prohibitions and restrictions of the regime.[305] Consequently, the regimes would have to make a significant contribution to the protection of human health in order to outweigh this level of restrictiveness. Indonesia has not made such a showing, and its defense under Article XX(b) therefore must fail.

9. Sufficiency of Domestic Supply Requirement

202. Finally, Indonesia argues that the domestic sufficiency requirement – that is, Indonesia's laws allowing importation of horticultural products and animals and animal products only when, and to the extent that, domestic supply of those products is deemed insufficient to meet Indonesians' basic needs[306] – "falls within the general exception for protection of human, animal, and plant life or health included in subparagraph (b) of Article XX of the GATT 1994."[307] Beyond this assertion, Indonesia provides no further evidence or argumentation in support of its defense under Article XX(b). Indonesia has put forward no evidence that the objective pursued by the laws setting out the domestic sufficiency requirement is "to protect human, animal or plant life or health" or that the measure makes any contribution to that objective. Thus neither element of Article XX(b) has been met.

203. Further, as demonstrated in the U.S. First Written Submission, the explicit goal of the laws establishing the domestic sufficiency requirement is to protect farmers from foreign

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[303] Indonesia's First Written Submission, paras. 162 (for the horticultural products import licensing regime), 170 (for the animals and animal products import licensing regime).

[304] *See Brazil – Retreaded Tyres (AB)*, paras. 144-145; *see also EC – Seal Products (AB)*, para. 5.169.

[305] U.S. First Written Submission, paras. 211-216, 318-326.

[306] U.S. First Written Submission, paras. 365-372.

[307] Indonesia's First Written Submission, para. 161.

competition and reduce (and eventually cease) imports.[308] The Horticultural law, for example, states that one of its policy objectives is to "provide protection for national horticultural farmers, business players, and consumers."[309] Indonesia has not denied that this is the objective of the domestic sufficiency requirement. Thus, Indonesia not shown that the measure's objective is the protection of human health and has not rebutted the co-complainants showing that the true objective of the measure is to protect domestic producers and to achieve self-sufficiency in food production.

D. None of the Challenges Measures Is "Necessary to Protect Public Morals," as Required by Article XX(a)

204. Indonesia asserts that its use, sale, and transfer restrictions on the importation of horticultural products, animals, and animal products fall under Article XX(a) of the GATT 1994 because they are necessary to protect public morals, specifically, the Islamic Halal food requirements.[310] To establish that each of these measures is preliminarily justified under Article XX(a), Indonesia must demonstrate that "it has adopted or enforced the measure to 'protect public morals' and that the measure is 'necessary' to protect such public morals."[311] Indonesia has not met either element with respect to any of its Article XX(a) defenses.

1. Use, Sale, and Transfer Restrictions for Horticultural Products

205. As described in co-complaints' first written submissions, Indonesia requires Registered Importers of Horticultural Products (RIs) to sell imported horticultural products to distributors and prohibits them from selling directly to consumers and retailers. Producer Importers of Horticultural Products (PIs) can only use imported horticultural products as materials in their production process and are prohibited from selling or transferring these products.[312]

206. Indonesia asserts that restricting the use, sale, and transfer of the imported horticultural products is necessary to protect consumers from non-Halal horticultural products at traditional markets because: (1) consumers assume that all food products sold in the traditional markets are Halal and (2) Indonesia lacks a "widely used labelling system" to warn consumers about non-Halal products.[313] Thus, restricting imported horticultural products to "uses that naturally" require some degree of labeling" is necessary to protect public morals.[314] As discussed above, Indonesia must first show that the objective of the use restrictions is to protect consumers from

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[308] U.S. First Written Submission, paras. 13-16, 82-84.

[309] Horticulture Law, art. 3 (JE-1).

[310] Indonesia's First Written Submission, paras 158-159 and 166; Indonesia's Opening Statement, para. 34; Indonesia's Response to Advanced Question, para. 35.

[311] *EC – Seal Products (AB)*, para. 5.169.

[312] U.S. First Written Submission, para. 193; New Zealand's First Written Submission, para. 251.

[313] Indonesia's First Written Submission, paras. 158, 159; Indonesia's Opening Statement, para. 34.

[314] Indonesia's First Written Submission, para 159.

mistakenly consuming non-Halal foods. Only after this showing is made does the Panel inquire as to whether the measure is "'necessary' to protect such public morals."[315]

207. The United States agrees that upholding the Halal food requirements in Indonesia constitutes a "public moral" under Article XX(a). However, Indonesia has failed to demonstrate that the use, sale, and transfer restrictions were adopted, enforced, or designed to protect Halal requirements for horticultural products.

208. Prior panels have looked to the design, architecture, and revealing structure of the measure, beginning with the text of the measure itself, as well as all other available evidence in assessing the connection between the measure at issue and the protection of the public moral.[316] The texts of the legal instruments setting forth the use, sale, and transfer restrictions, MOA 86/2013 and MOT 16/2013, as amended by MOT 47/2013, do not indicate that the objective of the restrictions is to uphold the Halal requirements for horticultural products.[317] The Horticulture Law, the statutory authority for the MOA and MOT regulations, also does not identify Halal as one its objectives.[318] In fact, these texts contain no reference to Halal requirements at all.

209. Moreover, Indonesia fails to provide any legislative history, public statements, reports or other evidence to show the connection between the restrictions on imported products and Halal requirements. Although Indonesia has referenced separate measures related to Halal food

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[315] *EC – Seal Products (AB)*, para. 5.169.

[316] *See EC – Seal Products (AB)*, para. 5.144.

[317] MOA 86/2013 (JE-15); MOT 16/2013, as amended by MOT 47/2013 (JE-10).

[318] *See* Horticulture Law (JE-1).

The United States notes that Indonesia has yet to explain how the Halal standards requirements and labeling requirements apply to fresh horticultural products. The two measures cited by Indonesia in its response to the Panel's questions appear to apply primarily to "packed foods." *See* Government Regulation No. 69/1999 on Food Labels and Advertisements, art. 10, July 21, 1999 (Exh. US-104) (stating: "Anybody producing or importing packed food into…Indonesia for trading and declaring that the said food is permissible for Moslems, shall…put the information or word 'halal' on labels."); Decree of the Minister of Religious Affairs No. 518/2001 on the Guidelines and Procedures for Auditing and Stipulating Halal Food, art. 2.1, Nov. 30, 2001 (Exh. US-105) (stating that: "to support the truth of halal statements issued by producers or importers of food packed for trading, the Auditing Agency audits the food first").

The United States also notes that Indonesia has failed to respond to Advance Panel Question No. 35(a) regarding whether the "technical enquiries" carried out by surveyors on all horticultural products include verifying whether the products comply with Halal requirements. Under MOT 16/2013, as amended by MOT 47/2013, the required verification or technical inquiry must include examining and verifying the country of origin, port of origin, type, volume, shipping time, port of destination, and various health and technical certificates of the prospective horticultural product imports. *See* MOT 16/2013, as amended by MOT 47/2013, art. 22(1) (JE-10). In keeping with this scope, the documents importers must submit for verification include the companies taxpayer ID number, registration card, business license, import identification number, PI or RI license, and Import Approval for the relevant period. *See* SUCOFINDO, "Horticulture," (updated Feb. 11, 2016) (Exh. US-80). There is no mention of any Halal requirements in either MOT 16/2013 or in SUCOFINDO's application documents.

labeling,[319] these measures speak to the existence of Halal requirements as a public moral in Indonesia, a point that the United States does not dispute. These measures do not show that Indonesia adopted its use, sale and transfer restrictions to protect consumers from non-Halal foods. Thus, Indonesia has failed to demonstrate the connection between these restrictions and the protection of Halal requirements.

210. Even if Indonesia could show that the protection of Halal requirements is an objective, the restrictions are not necessary to protect consumers from purchasing non-Halal horticultural products in traditional, open air, or other markets. Recalling the necessity analysis as articulated in Section IV.A, the Panel should consider the contribution of the restrictions to protecting consumers from non-Halal products and the trade restrictiveness imposed by the challenged measures.

211. First, Indonesia's sales restrictions limit the *person* to whom the imported horticultural products may be sold upon entry, not the products' ultimate *points of sales*. That is, Indonesia requires RIs to sell the imported products to a distributor and prohibits them from selling directly to consumers or retailers; but the measure does not prohibit the distributors from later selling the same imported products to consumers or retailers at traditional or other markets. Because the measure does not restrict the ultimate points of sale to consumers at all, restricting the initial sale to distributors does not contribute to consumers' ability to distinguish Halal from non-Halal horticultural products in the markets.

212. Second, Indonesia's argument that its measures operate by limiting imported horticultural products to "uses that naturally require some degree of labelling (e.g. listing food items on restaurant menus)"[320] is inapposite to the restrictions at issue. None of the relevant legal instruments or available evidence suggest distributors of imported horticultural products are subject to a stricter Halal labeling requirement or explain how restricting sales to distributors is a use that "naturally require some degree of labelling." Therefore, requiring imported horticultural products to pass through distributors does not further distinguish Halal from non-Halal products. The same imported horticultural products reach consumers in the traditional and other markets. Thus, the restrictions on horticultural products contribute nothing to the protection of Halal requirements.

213. Third, Indonesia's premises its necessity argument on the assertion that "there is no widely-used labelling system that could warn consumers" about non-Halal products.[321] However, its answers to Panel's Advanced Question 35[322] and Additional Question 68[323] suggest

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[319] Indonesia's Response to Advance Panel Question No. 35, para. 33, Indonesia's Responses to Panel Question No. 68, para. 42.

[320] Indonesia's First Written Submission, para 159.

[321] Indonesia's First Written Submission, para 159.

[322] Indonesia's Response to Advance Panel Question No. 35, para. 33.

[323] Indonesia's Response to Panel Question No. 68, para. 42.

otherwise. In response to the Panel's question regarding whether imported horticultural products must comply with Halal requirements, Indonesia said that (1) "food producers are responsible for verifying the halal compliance of any products they wish to label as 'Halal'" and (2) that importers must receive a certificate from the Indonesian Council of Ulama (MUI) to obtain Halal labeling.[324] When the Panel asked whether distributors must comply with Halal regulations with respect to local products, Indonesia responded that the Halal regulation "applies equally for local and imported products."[325]

214. The United States notes that it remains unclear from Indonesia's responses whether it requires Halal-labeling for imported horticultural products. However, if Indonesia asserts that a Halal labeling system applies to horticultural products, and that the system applies to both locally produced and imported horticultural products (and is therefore "widely used"), this assertion would conflict with its argument that the use, sale, and transfer restrictions are necessary. If an existing Halal labeling system already warns consumers that certain products, including imported products, may not be Halal, then restricting the sale of imported horticultural products only to distributors would not seem to contribute further to the protection the Halal standards.

215. With respect to the trade restrictiveness of the measures, the requirement that RIs sell only to distributors imposes significant limitations on importation of horticultural products because they force all economic actors into one distribution model. That is, RIs are forced to sell the imported horticultural products to distributors, and, in turn, supermarkets, grocery stores, and fruit and vegetable vendors have no alternative to purchasing from a distributor. Adding an artificial level in the supply chain increases the cost of imported horticultural products and reduces their competitive opportunities.[326]

216. Because Indonesia's restrictions on imported horticultural products bear minimal, if any, connection to the protection of Halal requirements and do not make any contribution to achieving that objective, a reasonably available alternative measure would be simply to remove the requirements. Removing the requirements, and maintaining the existing Halal labelling requirements identified by Indonesia (Government Decree 69/1999 and MORA Decree 518/2001), would make an equivalent contribution to public morals and would eliminate completely the measure's unjustifiable trade-restrictive effect.

217. Finally, we note that although Indonesia asserts that its use, sale and transfer restrictions on horticultural products imported by PIs is justified under Article XX(a), it has not offered any evidence or explanation in support of this assertion. That is, Indonesia failed to articulate how restricting a PI's imported horticultural products to use in its own industrial production only and prohibiting PI's from selling or transferring to another entity is necessary to the protect the Halal

[324] Indonesia's Response to Advance Panel Question No. 35, para. 33.

[325] Indonesia's Response to Panel Question No. 68, para. 42.

[326] *See* U.S. First Written Submission, para. 194.

requirements. Thus, Indonesia has also failed to make its Article XX(a) *prima facie* case with respect to the use, sale and transfer restrictions for PIs.

2. End-Use Restrictions for Animal Products

218. As described in the co-complaints' first written submissions, Indonesia restricts the importation of animals and animal products to certain limited purposes. Live animals can only be imported for the purpose of, *inter alia*, overcoming domestic shortfalls.[327] Beef products listed in Appendix 1 to MOT 46/2013 and MOA 139/2014, as amended, can only be imported for use in manufacturing, hotels, restaurants, and for catering or for other limited purposes.[328] Appendix 1 beef products cannot be sold for retail in modern or traditional markets. Indonesia imposes the same restrictions on the importation of non-beef products and offals listed in Appendix 2 to MOT 46/2013 and MOA 139/2014, but permits sales in modern markets (supermarkets, convenience stores).[329] These restrictions mean that no imported animals or animal products can be sold in traditional, open air markets, where Indonesian consumers make 70 percent of their fresh meat purchases.[330]

219. Indonesia contends that the end-use restriction is necessary to protect public morals because "it prevents consumers from mistakenly purchasing animals and animal products that do not conform to Halal requirements."[331] Indonesia again asserts, without providing any evidence in support, that there is no widely-used product labelling system in traditional, open air markets and that restricting imported animals and animal products prevents the commingling of Halal and non-Halal food.[332]

220. The United States agrees that protection of consumers from mistakenly consuming non-Halal foods is a public moral within the meaning of Article XX(a) and U.S. exporters make every effort to ensure compliance with Indonesia's Halal requirements. However, Indonesia has failed to demonstrate that the measures restricting the outlets in which imported animal products can be sold were adopted, enforced, or designed to protect Halal requirements.

221. Other than its unsupported assertions, Indonesia has not presented any evidence from the texts of the regulations, legislative history, policy statements, or other sources to show that the objective of the end-use restrictions is to prevent the commingling of Halal and non-Halal food.

222. In fact, in MOA 139/2014, as amended, and MOT 46/2013, as amended, the provisions setting forth the end-use restrictions do not establish, explain, implement or even reference the

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[327] U.S. First Written Submission, para. 292.

[328] U.S. First Written Submission, para. 292.

[329] U.S. First Written Submission, para. 292.

[330] U.S. First Written Submission, para. 294.

[331] Indonesia's First Written Submission, para. 166.

[332] Indonesia's First Written Submission, para. 166.

Halal standard at all.[333] Thus, based on the evidence in the record, the end-use restrictions were not were not adopted, enforced or designed, to protect the Halal standard.

223. Even if the Panel finds that the protection of Halal requirements is an objective of the measure, the end-use restriction still fails the "necessary" standard of Article XX(a). For imports entering Indonesia, it is not necessary to restrict the outlets in which imported animal products can be sold, because all imported animal products, with the exception of pork, must conform to Indonesia's Halal standards and be labeled as such.

224. To be eligible to ship animal products to Indonesia, companies must comply with all of Indonesia's Halal requirements, including being supervised by a Halal Certification Agency recognized by the Indonesian Halal Authority.[334] Additionally, before being confirmed as an "importing business unit," companies must undergo an audit of their "animal product safety and halal assurance system."[335] All animal products other than swine meat must bear a "Halal logo,"[336] and imported Halal and non-Halal products are prohibited from being transported in the same container.[337]

225. Indonesia's Halal requirements are established by MUI, which also administers and enforces the Halal regime.[338] MUI only recognizes Halal certificates issued by approved Halal certification bodies in exporting countries. There are currently six bodies in the United States that are authorized by MUI to certify to Indonesia's Halal Standards,[339] and all animal products exported to Indonesia (other than pork) must obtain a Certificate of Islamic Slaughter from one of these bodies and must comply with Indonesia's halal labelling requirements.[340]

226. Thus, Indonesia's end-use restrictions on imported animal products are not "necessary" to protect public morals in the form of Halal standards because, with the exception of pork, all

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[333] MOA 139/2014, as amended, arts. 30, 32 (JE-28); MOT 46/2013, as amended, articles 17, 19 (JE -21).

[334] MOA 139/2014, as amended, arts. 7, 13 (JE-28).

[335] MOA 139/2014, as amended, art. 15 (JE-28).

[336] MOA 139/2014, arts. 17, 19, Attachment 1, Format 1 (stating that that any shipment of poultry carcasses or poultry meat from overseas must be in accordance with Halal requirements and accompanied by a halal certificate); *id.* Attachment 1, Format 2 (same requirement for processed meat); *id.* Attachment 1, Format 3 (same requirement for beef meat).

[337] MOA 139/2014, as amended, art. 21 (JE-28).

[338] *See* Majelis Ulama Indonesia, "Halal Certification Requirements" (accessed Jan. 26, 2016) (Exh. US-63).

[339] *See* Letter from Ir. Lukmanul Hakim, M.Si., Director, Indonesian Council of Ulama, to Mr. Ali Abdi, Agriculture Counselor, U.S. Embassy, Jakarta, Feb. 6, 2014 (Exh. US-64); Majelis Ulama Indonesia, "List of Approved Foreign Halal Certification Bodies," (January 2016) (Exh. US-65); U.S. Dep't of Agriculture, Foreign Agriculture Serv., *GAIN Report ID9028: Newest List of Approved Halal Certification Bodies*, Oct. 28, 2009 (Exh. US-66).

[340] U.S. Dep't of Agriculture, Food Safety & Inspection Serv., "Export Requirements for Indonesia" (Aug. 5, 2015) (Exh. US-67).

imports of animal products into Indonesia *already meet Indonesia's Halal standards and labelling requirements*. Further, to the extent that Indonesia seeks to justify the entire challenged measure under Article XX(a), its statements concerning traditional markets would not address the prohibition on all retail sale (including in modern markets) with respect to Appendix I (beef) products.

227. With respect to trade restrictiveness, the end-use restrictions on imported beef and non-beef meat products imposes significant limitations on the competitive opportunities of these products in Indonesia. As described in the U.S. First Written Submission, Indonesians consumers conduct at least half of their food shopping in traditional markets, where they make approximately 70 percent of their fresh meat purchases.[341] Therefore, the end-use restrictions cut off all access of imported non-beef meat products to the venue where most Indonesians shop and exclude beef products from the retail sector all together.

228. Moreover, a reasonably available alternative measure exists. That is, in order to protect consumers from non-Halal foods, Indonesia could simply rely on its existing Halal rules and requirements. These requirements are available to Indonesia, as they currently are in place. They also are much less trade-restrictive than the imposition of both halal requirements *and* end-use restrictions, and lead to the same level of Halal protection, as the use restrictions contribute nothing additional to the protection afforded by the Halal standards and labelling requirements.

3. Import Licensing Regimes as a Whole

229. Indonesia asserts that its import licensing regimes for horticultural products and for animals and animal products, as a whole, fall within the scope of Article XX(a).[342] As with the Article XX(b) and XX(d) defenses of the regimes as a whole, Indonesia has failed to explain or present any evidence in support of its assertion of defense under Article XX(a). However, again assuming that Indonesia's defenses of the regimes as a whole derive from its defenses of the end-use restrictions, because Indonesia has not established a defense under Article XX(a) with respect to the end-use restrictions, it similarly has not established a defense of the regimes as a whole. Although the United States accepts that protection of Halal standards may constitute a public moral, Indonesia has not established that it has adopted or enforced the import license regimes as a whole to "protect public morals" or that the regimes as a whole are 'necessary' to protect such public morals."[343]

230. Moreover, any small contribution that the regimes might make to the protection of Halal standards would have to be weighed against the trade-restrictiveness of the import licensing regimes as a whole. As described above in the context of Articles XX(b) and (d) and in the U.S. First Written Submission, the regimes as a whole are significantly more trade-restrictive than the

[341] U.S. First Written Submission, para. 295.

[342] Indonesia's First Written Submission, paras. 162 (for the horticultural products import licensing regime), 170 (for the animals and animal products import licensing regime).

[343] *EC – Seal Products (AB)*, para. 5.169.

measures considered in isolation due to the interaction and combined operation of the individual prohibitions and restrictions of the regime.[344] Consequently, the regimes would have to make a significant contribution to the protection of the Halal requirement in order to outweigh this level of trade-restrictiveness, a showing which Indonesia has not made.

E. Even if a Challenged Measure Were Preliminarily Justified under an Article XX Subparagraph, All of the Challenged Measures Are Applied Inconsistently with the Article XX Chapeau

231. As discussed in Section IV.A, Indonesia – as the party invoking an Article XX exception – has the burden to demonstrate that it has met the requirements of the chapeau of Article XX. That is, Indonesia must demonstrate that the measures at issue are not (1) applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or (2) disguised restrictions on international trade.

232. In assessing the arbitrary or unjustifiable discrimination element, the Appellate Body has found that "[o]ne of the most important factors…is the question of whether the discrimination can be reconciled with, or is rationally related to, the policy objective with respect to which the measure has been provisionally justified under one of the subparagraphs of Article XX."[345]

233. Regarding the "disguised restriction on trade" element, the Appellate Body has found that this phrase "may properly be read as embracing restrictions amounting to arbitrary or unjustifiable discrimination in international trade taken under the guise of a measure formally within the terms of an exception listed in Article XX."[346] Finding that "to disguise" means "to deceive" and "to misrepresent," the panel in *EC- Asbestos* considered that a restriction "which formally meets the requirements of Article XX[] will constitute an abuse if such compliance is in fact only a disguise to conceal the pursuit of trade-restrictive objectives."[347]

234. In *Thailand – Cigarettes (Philippines)*, the Appellate Body found that Thailand had failed to meet the requirements of the chapeau when it made only one cursory and conclusory reference to the chapeau during the panel proceeding.[348] In the present dispute, Indonesia has yet to offer any explanation or evidence with respect to whether the measures at issue meet the requirements

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[344] U.S. First Written Submission, paras. 211-216, 318-326.

[345] *EC – Seals (AB)*, para. 5.306.

[346] *US – Gasoline (AB)*, p. 25.

[347] *EC – Asbestos (Panel)*, para. 8.236.

[348] *Thailand – Cigarettes (Philippines) (AB)*, para. 1791 (stating: "In its entirety, this reference consisted of Thailand's argument that, '[g]iven that these measures are applied to all products, imported or domestic, subject to VAT, they are not applied in a manner that constitutes an arbitrary or unjustifiable discrimination or a disguised restriction on international trade.' This cannot suffice to establish that the additional administrative requirements fulfil the requirements of the chapeau of Article XX.")

of the chapeau. Thus, all of Indonesia's claims fail, on their face, to establish the requisite elements of an Article XX defense.

235. To the extent that Indonesia subsequently offers arguments or evidence on the chapeau, it remains difficult to see how it can meet its burden, given the facts on the record. The measures at issue arbitrarily or unjustifiably discriminate against imports because they impose significant restrictions on trade and bear little or no relationship to the policy objectives with respect to which Indonesia seeks to justify them under the Article XX subparagraphs.

236. With respect to Article XX(a), the end-use and use, sale and transfer restrictions, which prohibit or restrict imported products' access to retailers and consumers, result in arbitrary and unjustifiable discrimination for two reasons. First, as discussed above, the restrictions are not rationally related to the objective of protecting consumers from non-Halal food. Channeling all imported horticultural products to distributors adds no value to Halal identification. And all imported animal products (except for pork) already comply with Indonesia's Halal standards and labeling requirements, so the addition of end-use restrictions is unnecessary, and, therefore, unrelated to achievement of the objective. Second, without the underlying justification, the restrictions serve only to impose burdens on importation that do not exist for domestic products. Domestic horticultural product are not required to be sold through distributors, and domestic animal products are not barred from traditional and other markets.

237. This is also the case with respect to Indonesia's assertions regarding Article XX(b). Indonesia's restrictions based on the domestic harvest period, importers' storage capacity, the use, sale and transfer of imported products, and the time since products were harvested, as well as the Reference Price and domestic purchase requirements, constitute arbitrary and unjustifiable discrimination. As detailed in Section IV.C, each of these restrictions bears little, if any, relationship to the objective of protecting human, animal, and plant life or health. Because they lack any rational connection to the objective, the result of these restrictions is only to impose burdensome costs and limitations on the importation of horticultural and animal products.

238. Finally, with respect to Article XX(d), Indonesia has shown no rational connection between the application windows and validity periods, fixed license terms, realization requirements, storage capacity requirements, and use, sale, and transfer restrictions and the stated objective of securing compliance with customs laws.[349] Because none of these restrictions relate to achieving the objective of securing compliance with Indonesia's customs laws, these restrictions exist solely to restrict imports and protect the domestic industry and, therefore, result in arbitrary and unjustifiable discrimination.

239. For the same reasons the challenged measures result in arbitrary and unjustifiable discrimination, the challenged measures also constitute disguised restrictions on trade. In addition, evidence from official government policies, the texts of the measures, and statements from government officials confirm that the true objective behind Indonesia's import restrictions

[349] *See* Section IV.B.1.

is the protection of its own domestic producers. As described in the U.S. First Written Submission, Indonesia has pursued an official policy of "self-sufficiency" with respect to food, which aims to gradually reduce and ultimately end the importation of all agricultural products.[350] This "self-sufficiency" objective lies at the heart of all the measures at issue. Indeed, the Horticulture Law, the Animal Law, the Food Law, and the Farmers' Law all contain imperatives that allow importation only if local production or supply is insufficient to meet demand.[351] Government officials, from cabinet ministers to civil servants, have expressed the government's goal of reducing imports of beef, horticultural products and other foods.[352]

240. Perhaps the most revealing evidence regarding Indonesia's trade restrictive objectives is the May 6 letter regarding the seasonal restrictions on horticultural products.[353] In this intra-ministry communication, government officials charged with administering these restrictions openly discuss *how* and *why* they restrict imported products. Specifically, the Ministry of Agriculture Director of Horticulture explains that he imposes these restriction to ensure that imported horticultural products do not compete with local products during their harvest season.

241. Therefore, even if, later in the proceeding, Indonesia offers arguments with respect to the Article XX chapeau, it is difficult to see how Indonesia could meet its burden to show that the measures do not constitute arbitrary or unjustifiable discrimination or disguised restrictions on trade, given the significant amount of record evidence to the contrary.

IV. CONCLUSION

242. For the foregoing reasons, the United States respectfully requests that the Panel find that the prohibitions and restrictions imposed by Indonesia's import licensing regimes for horticultural products and animals and animal products, operating individually and as whole regimes, and the provisions of Indonesia's laws conditioning importation on the insufficiency of domestic demand, are inconsistent with Article XI:1 of the GATT 1994 and Article 4.2 of the Agreement on Agriculture.

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[350] U.S. First Written Submission, para. 10.

[351] U.S. First Written Submission, paras. 13-16, 82-83.

[352] U.S. First Written Submission, paras. 16, 85.

[353] U.S. First Written Submission, paras. 62, 63; May 6 Letter (Exh. US-25).